PLEA BARGAINING IN THE SHADOW OF A RETRIAL: BARGAINING AWAY INNOCENCE

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Critics of plea bargaining have long contended that it has an innocence problem—that the imbalanced and coercive nature of plea negotiations can induce even innocent defendants to plead guilty. While laboratory studies confirm that innocent individuals can indeed be induced to plead guilty, little real-world empirical evidence exists about the nature and extent of plea bargaining's innocence problem.

Drawing on original empirical data, this Article begins to fill that void. Looking at cases in a post-conviction context, we study the extent to which prosecutors in real cases use their plea-bargaining power to preserve convictions, even when the convictions appear to be deeply flawed and the chances the defendants are innocent are high. We also examine the degree to which innocence-claiming defendants succumb to those pressures and accept the deals. To address these questions, we collected a wide range of data from U.S.-based member organizations of the Innocence Network about the cases they litigated from 2010 to 2020.

In broadest terms, the data reveal that, in post-conviction litigation involving defendants with a high likelihood of actually being innocent and wrongly convicted, prosecutors offered plea bargains in 23% of the cases. Moreover, when prosecutors made plea offers, the plea concessions they offered were uniformly steep. Prosecutors on average offered to knock off close to half—45%—of the original sentences. The effect was that they offered to erase more than 90% of the total time the defendants had left to serve; the remaining years the defendants had to serve represented on average 6% of the original maximum-imposed sentence. Indeed, in 88% of the cases, the effective remaining years on the sentence derived from the plea offer were zero, as most prosecutors offered time served. The data also show that in total, 59% of the defendants accepted these hard-to-refuse bargains. Finally, in most cases in which defendants rejected plea offers prior to adjudication of their post-conviction motions, and in every case in which they rejected plea offers made after they had won a new trial, they nonetheless prevailed in obtaining relief from their convictions.

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Examining these patterns through the lens of the shadow-of-the-trial theory of plea bargaining, we find that our data provide preliminary evidence that some prosecutors do indeed bargain strategically in the shadow of a trial, discounting the maximum sentence sought by the perceived likelihood of conviction, and they do so even when the likelihood of conviction appears virtually nil. Hence the data also offer support for the concern that some prosecutors are using their leverage in plea bargaining to preserve convictions in serious cases, even when they know the chances of conviction at trial are quite low and therefore the possibility of innocence is unusually high. Finally, this Article explores possible reforms to mitigate the harmful consequences of these patterns in a system ostensibly designed to seek the truth and protect the innocent.

INTRODUCTION

Plea bargaining has a serious innocence problem.[1] Or at least both theory and experience suggest as much. The pressures to take a plea to avoid the risks of onerous sentences that could follow a wrongful conviction after a trial are so immense that they can induce even innocent people to plead guilty.[2] The sparse empirical data we have confirm that this problem is real. Laboratory studies reveal that high percentages of innocent individuals can be induced through bargaining to plead guilty to offenses they did not commit.[3] In a real-world context, among those who have been exonerated by post-conviction DNA testing, 12% (44/375) pled guilty.[4] The more extensive database of exonerations maintained by the National Registry of Exonerations—which includes exonerations based on all types of evidence, not just DNA—reports that, since 1989, guilty pleas have accounted for nearly 22% (672/2,997) of known wrongful convictions,[5] and data from recent years show even higher false guilty-

1. Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009); Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 UTAH L. REV. 51, 57.

2. *See* Dervan, *supra* note 1, at 56 ("Today, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal."); *State v. Nash*, 951 N.W.2d 404, 422 (Wis. 2020) (Rebecca Bradley, J., concurring) ("Extortive plea bargaining encourages the guilty to hold out for reduced charges and a lighter sentence while coercing the innocent to plead guilty in fear of increased charges and a harsher sentence. For the sake of expediency, the justice system appallingly results in the incarceration of the innocent."); John H. Blume & Rebecca K. Helm, Essay, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 169 (2014) ("[P]rosecutors can extract a guilty plea in almost any case, regardless of the defendant's guilt or innocence, by dramatically changing the cost-benefit analysis."); CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 170–71 (2021).

3. Miko M. Wilford, Gary L. Wells & Annabelle Frazier, *Plea-Bargaining Law: The Impact of Innocence, Trial Penalty, and Conviction Probability on Plea Outcomes*, 46 AM. J. CRIM. JUST. 554, 559–61 (2021) (finding that, in laboratory studies, more than 50% of college-student subjects were induced to plead guilty to offenses they did not commit when offered plea bargains that mitigated potential punishments); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 4 (2013).

4. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/P9UY-UF69] (last visited Mar. 14, 2022).

5. THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P [https://perma.cc/FWF9-FA9M] (last visited Mar. 14, 2022).

plea rates—ranging from a high of 44% of known exonerations in 2015 to 22% in 2020.[6]

As startling as these numbers are, they surely represent a vast undercounting of plea bargaining's innocence problem, as numerous forces make it particularly difficult to expose and correct—and hence to count—wrongful convictions based upon guilty pleas. Those forces include systemic features such as the guilty-plea waiver rule,[7] the unavailability of advocacy resources in guilty-plea cases or cases with short sentences that can be produced by plea bargains,[8] statutory bars to post-conviction DNA testing in guilty-plea cases,[9] and the reality that most guilty pleas by the innocent probably occur in minor cases, in which no one pays attention to the outcome and no one bothers to pursue relief.[10] The guilty-plea innocence problem is also troubling because it likely

6. The data gleaned from manipulating the search tags on the Registry's website show the following rates of guilty pleas in exoneration cases for each of the last six years: 43% in 2015; 44% in 2016; 34% in 2017; 33% in 2018; 24% in 2019; and 28% in 2020. THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.cc/RS9A-4WJA] (last visited Mar. 14, 2022). Note that these rates are continually changing as the Registry finds and adds to its dataset additional exonerations.

7. *See, e.g.*, *Cooper v. State*, 356 S.W.3d 148, 153 (Mo. 2011) (en banc) (holding that a guilty plea waives "all nonjurisdictional defects, including statutory and constitutional guaranties" (quoting *Feldhaus v. State*, 311 S.W.3d 802, 804 (Mo. 2010) (en banc))); *State v. Kelty*, 716 N.W.2d 886, 892 (Wis. 2006) ("The general rule is that a guilty, no contest, or *Alford* plea 'waives all nonjurisdictional defects, including constitutional claims . . . .'" (quoting *State v. Multaler*, 643 N.W.2d 437 (Wis. 2002))). *But see Class v. United States*, 138 S. Ct. 798, 801–02 (2018) (holding that a guilty plea alone does not always bar a federal criminal defendant from challenging the constitutionality of their conviction).

8. *See* Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1168 & n.50 (2010–2011) (noting that "cases involving these types of [minor] crimes often produce comparatively short sentences that no one looks into on a systematic basis" and that "[m]any innocence projects, for example, as a matter of policy only accept cases involving substantial un-served prison sentences"); Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 536 (2005) ("[N]obody, it seems, seriously pursues exonerations for defendants who are falsely convicted of shop lifting, misdemeanor assault, drug possession, or routine felonies . . . .").

9. Many post-conviction DNA-testing statutes limit such testing and its exonerating potential to cases in which identity of the perpetrator was an issue *at trial*. Such statutes exclude all who were convicted by guilty or no contest pleas. *See* Daina Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1430–31 (2004); Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing* Statutes, 38 CAL. W. L. REV. 355, 356–57 (2002).

10. *See* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 938 (2008); Alexandra Natapoff, *Misdemeanors*, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 73 (Erik Luna ed., 2017).

exacerbates pervasive disparities in the criminal justice system; as Kent Roach has observed, "There is . . . reason to believe that women, youth, and racialized and other disadvantaged individuals, including those with mental health issues and mental disabilities, may be at particular risk of making false guilty pleas."[11]

Anecdotal accounts illustrate plea bargaining's innocence problem.[12] Take the case of Kerry Max Cook. In 1977, Cook was charged with the rape, mutilation, and murder of a woman in Tyler, Texas.[13] Over the next two decades, Cook was tried three times—twice culminating in death sentences and once, sandwiched between the death sentences, in a hung jury.[14] The third trial, which produced the second of the death sentences, was reversed in 1996 because of police and prosecutorial misconduct.[15] Undeterred by the setbacks or by the new unavailability of a key witness, the prosecution pledged nonetheless to try Cook a fourth time. As the prosecution contemplated its vastly weakened case, the prosecutor responded not by dismissing the charges, but by offering a plea bargain—remarkably, for such a heinous crime, to time served (twenty-two years in prison by then).[16] Reportedly, Cook adamantly refused, telling his lawyer, "I want to be free, I want this behind me, but I will go back to death row, I will let them strap me to the gurney and put the poison in my veins before I lie, before I plead guilty."[17] So the prosecutor sweetened the deal even more, until it was simply too good to refuse: the prosecutor offered Cook

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11. Kent Roach, You Say You Want a Revolution? Understanding Guilty Plea Wrongful Convictions 1 (Jun. 30, 2021) (unpublished manuscript) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3869888 [https://perma.cc/57TL-NQQ7] (citing Amanda Carling, *A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions*, 64 CRIM. L.Q. 415 (2017)).

12. *See, e.g.*, Stephanie Clifford, *Wrongly Convicted, They Had to Choose: Freedom or Restitution*, N.Y. TIMES (Mar. 5, 2021), www.nytimes.com/2019/09/30/us/wrongful-convictions-civil-lawsuits.html?referrer=masthead [https://perma.cc/7LKM-87L5]; Samuel H. Pillsbury, *Even the Innocent Can Be Coerced into Pleading Guilty*, L.A. TIMES (Nov. 28, 1999), https://www.latimes.com/archives/la-xpm-1999-nov-28-op-38287-story.html [https://perma.cc/E2AL-PHR6].

13. Dervan, *supra* note 1, at 82 (citing *Kerry Max Cook*, PBS: FRONTLINE (June 17, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/cook.html [https://perma.cc/9F85-2RJW]).

14. *Id.* at 82–83 (citing *Kerry Max Cook*, *supra* note 13).

15. *Cook v. State*, 940 S.W.2d 623, 624–26 (Tex. Crim. App. 1996) (en banc). In her recent book, Emily Bazelon observes, "Chillingly, prosecutors may be more likely to withhold evidence when proof of guilt is uncertain." EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM PROSECUTION AND END MASS INCARCERATION 225 (2019). She elaborates, "If you think the suspect did it but you don't quite have the goods to convict, you may be tempted to put a thumb on the scale." *Id.*

16. Dervan, *supra* note 1, at 83 (citing *Kerry Max Cook*, *supra* note 13).

17. *Id.* (quoting *Kerry Max Cook*, *supra* note 13).

an *Alford* plea[18] for time served, under which Cook could affirmatively maintain his innocence while taking a deal that would result in his conviction but set him free.[19] Two months after Cook took that deal and walked free, DNA testing proved his actual innocence, although he remained officially a convicted killer because his *Alford* plea stood as a procedural barrier to exoneration.[20]

As Cook's case illustrates, constitutional doctrine expressly acknowledges and accepts the likelihood that the plea-bargaining system will snare some innocents—that is, constitutional law approves of plea bargaining's innocence problem, at least to some degree.[21] In 1970, in *North Carolina v. Alford,*[22] the Supreme Court held that conviction by plea bargain is permissible, even for defendants who affirmatively insist that they are innocent and who hence refuse to provide the evidence previously required to prove guilt and justify such convictions—the defendant's in-court confession.[23]

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18. So named after the Supreme Court case that approved the practice of accepting pleas by defendants who affirmatively claim innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970). The case of the West Memphis Three is another example of the use of an *Alford* plea combined with a promise of time served to induce pleas from defendants whose convictions were challenged with strong new evidence of innocence. The case was the subject of a series of documentaries and a number of books and popular songs, all raising concerns that the case constituted a grave miscarriage of justice. The documentaries included PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS (HBO 1996); PARADISE LOST 2: REVELATIONS (HBO 2000); and PARADISE LOST 3: PURGATORY (HBO 2011). For a fuller discussion of the West Memphis Three case, see Blume & Helm, *supra* note 2, at 158–60.

19. Dervan, *supra* note 1, at 83 (citing *Kerry Max Cook*, *supra* note 13).

20. Michael Hall, *Released but Never Exonerated, a Man Fights for Freedom*, N.Y. TIMES (Mar. 31, 2012), https://www.nytimes.com/2012/04/01/us/released-but-not-exonerated-kerry-max-cook-fights-for-true-freedom.html [https://perma.cc/CKL2-ASVN].

21. *See* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1156 (2005) ("An *Alford* plea, where the defendant pleads guilty but simultaneously denies having committed the crime, clearly puts the court on notice that this guilty plea is problematic . . . .").

22. 400 U.S. 25.

23. Until the twentieth century, courts treated guilty pleas as little different from a form of in-court confession and hence required a voluntary admission of guilt. Dervan, *supra* note 1, at 65; Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 12–13 (1979) [hereinafter Alschuler, *Plea Bargaining and Its History*]. Although the Court in *Alford* broke new ground by expressly permitting guilty pleas with a simultaneous claim of innocence, the Court also declared that it would insist in such cases that the "record before the judge contain[] strong evidence of actual guilt." *Alford*, 400 U.S. at 37, 38 n.10. Courts often do not require any special procedures or evidentiary requirements for meeting this standard. *See, e.g.*, *State v. Nash*, 951 N.W.2d 404, 419–21, 419 n.12 (Wis. 2020) (collecting cases). As Alschuler has put it, *Alford* made "the requirement of a factual basis . . . relatively unimportant" because the Court "did not specify what kind of hearing a trial court must conduct before accepting a . . . plea." Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1292–93 (1975) [hereinafter Alschuler, *The Defense Attorney's Role in Plea Bargaining*].

Plea bargaining's innocence problem is also implicit in the dominant theoretical explanations for bargaining in criminal cases. Plea bargaining is typically theorized as analogous to contracting, whereby terms are set by cost-benefit analyses as in any market-based system for negotiating contracts.[24] Under that theory, parties bargain "in the shadow of a trial"[25]—that is, they assess the likely sanction that might be imposed following a trial and discount that sanction by the likelihood of conviction at a trial (and by the costs of going to trial) to arrive at a disposition that is rational for both parties.[26] In its simplest form,[27] if the parties, acting

24. *See* Covey, *supra* note 1, at 77 ("Trial shadow theory provides the dominant account of plea bargaining."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 292 (1983) ("The penalty, multiplied by the probability that it will be imposed for a given offense, is the price of that offense, in just the same way that expected damages judgments, multiplied by the probability that such judgments will be paid, are the price to manufacturers of making hazardous products."); *id.* at 308 ("Plea bargaining establishes the price for most crimes. It establishes price in the same way as bargaining in the market for goods and services.").

25. The trial-shadow theory of bargaining was first developed more than forty years ago in an article analyzing bargaining in divorce cases. Robert Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Mnookin and Kornhauser spoke of bargaining "in the shadow of the law," while most plea-bargaining literature speaks of bargaining "in the shadow of a trial," but, as William Stuntz has explained, "the difference is semantic, not substantive. The reason one would want plea bargains to reflect trial outcomes is that trials, at least in theory, constitute accurate applications of the law. Internalizing the one means internalizing the other." William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 & n.3 (2004). For other literature applying the trial-shadow theory to bargaining in civil cases, see, for example, Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); and Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

26. *See* Easterbrook, *supra* note 24, at 309–17; Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66–69 (1971); Edward A. Ruttenburg, *Plea Bargaining Analytically—The Nash Solution to the Landes Model*, 7 AM. J. CRIM. L. 323, 353 (1979); Scott & Stuntz, *supra* note 24, at 1910; HESSICK, *supra* note 2, at 36–38.

27. Frank Easterbrook, among others, has identified other complexities inherent in the full theory—for example, the value of the bargain must also include an additional discount "because people discount the future." Easterbrook, *supra* note 24, at 294. For example, people tend to view ten years' imprisonment that starts tomorrow as more onerous than ten years' imprisonment that starts at some point in the more distant future. *Id.*; *see also id.* at 295, 311 ("Discounting means that the prospect of twenty years' imprisonment is not twice as onerous as the prospect of ten years' imprisonment. If the discount rate is 10 percent, the prospect of twenty years' imprisonment is twice as serious as the prospect of 5.82 years in jail. . . . [Hence, if] a defendant thinks that he has a 50 percent chance of being convicted and will receive a twenty-year sentence if convicted, . . . he will find attractive any offer of less than 5.82 years in jail.").

rationally under the governing law and prevailing legal norms, believe that the likely sentence after a trial would be ten years in prison, and the chances of conviction are eighty percent, then both parties will see it as being in their interest to accept a plea bargain to a conviction with an eight-year sentence. Acting rationally, the defendant should accept a plea to any term less than and up to eight years (regardless of guilt or innocence), and the prosecutor should accept a deal to any term of eight years or greater. The deal will converge on eight years.

This Article attempts to understand the nature and extent of plea bargaining's innocence problem by looking at bargaining in innocence cases through the lens of the trial-shadow theory, or market model, of plea bargaining. By innocence cases, we mean cases in which an innocence advocacy organization, such as the Innocence Project[28] or another member organization of the Innocence Network,[29] has identified a convicted individual in prison for a serious crime who has a strong claim of actual innocence and has initiated litigation seeking exoneration on behalf of that individual. We examine prosecutorial charging practices, plea-bargaining practices of both prosecutors and defendants, the plea-bargaining system itself, and its innocence problem in the context of bargains offered during post-conviction innocence litigation.[30]

We undertake this inquiry in part because anecdotal reports and the experiences of innocence advocates suggest a phenomenon that raises ethical and legal questions. Not infrequently, prosecutors confronted with powerful innocence-based challenges to convictions respond by offering extraordinarily generous plea bargains—frequently time served for even the most serious offenses, as in the Kerry Max Cook case—in an apparent attempt to preserve those shaky convictions.[31] Plea bargaining in these cases can arise at one of two points: (1) before the court rules on the post-conviction motion, the parties can agree to a resolution that adjusts either the offense of conviction or the penalty or both, subject to the court's approval; or (2) after a new trial is granted and the case has therefore been returned to pretrial status, the parties can negotiate a resolution of the case just as they could in any other pretrial situation. To the extent that the trial-shadow model accurately describes what is happening in these bargains, the anecdotal reports suggest that prosecutors are reducing bargained-for penalties to near zero because they recognize the case is virtually unwinnable at trial and that, accordingly, they may in fact be forcing a

28. *See* INNOCENCE PROJECT, https://innocenceproject.org [https://perma.cc/C3Y6-MTQY] (last visited Mar. 14, 2022).

29. *See* INNOCENCE NETWORK, https://innocencenetwork.org [https://perma.cc/Z9XK-3NWU] (last visited Mar. 2, 2022).

30. *See, e.g.*, Clifford, *supra* note 12.

31. For a description of several such cases and an analysis of the problem, see Blume & Helm, *supra* note 2.

conviction onto an innocent person. This Article draws on original empirical data to examine the extent to which, and how, this may be happening.

In Part I, the Article examines the trial-shadow model of plea bargaining, along with its weaknesses and competing models, all in light of the potential for an "innocence problem." After examining the literature and the criticisms of the model, this Article concludes that, although imperfect, the trial-shadow model has significant descriptive and predictive power, at least in prosecutions for the most serious types of crimes—typically murder and rape—which compose the bulk of the caseloads of most innocence organizations. It also explains why cases in this post-conviction posture provide a uniquely useful cohort of cases for potentially (indeed, likely) innocent defendants engaged in plea bargaining. Part I thus explains why this Article employs innocence-based litigation by Innocence Network member organizations as an imperfect but useful proxy for litigation in cases with actually innocent defendants.

Part II describes the empirical research undertaken for this Article, in which anonymized case data have been gathered from Innocence Network member organizations from across the nation. The data are used to examine plea-bargaining practices in innocence-based post-conviction litigation undertaken from 2010 to 2020. Part II then analyzes the data, showing the extent and nature of plea bargaining in these potential innocence cases.

The data show that defendants obtained some relief in a total of 220 of the 250 cases (88%) in our study that had been resolved at the time of our analysis. In stark contrast, only 29 cases (12% of the cases litigated to resolution) resulted in denial of relief. Among the full cohort of 272 cases studied, 199 (73%) resulted in a new trial, one case was dismissed under a unique state law permitting a finding of actual innocence, one was resolved through resentencing, 20 were settled via plea bargain, and 22 were still pending at the time the data was collected. Considering only those cases that had reached a final resolution (250 cases), that means that 80% of resolved cases resulted in a new trial or outright dismissal, and the defendant obtained some other form of relief (via plea bargain) in another 8% of the cases. Part II examines the data in terms of several significant variables that help us understand the nature of plea bargaining in serious cases with strong claims of innocence.

Perhaps of greatest significance, the data show that prosecutors did indeed, in a notable proportion—though still a minority—of the cases, offer plea bargains to these potentially innocent defendants. Sometimes the plea offers came before a court ruled on the defendant's post-conviction motion (PCM), in an apparent attempt to preserve the conviction. Other times, the plea offers came after the court granted a new trial, in an apparent attempt to salvage some type of conviction. When prosecutors made plea offers, they offered plea discounts that were

uniformly steep—often to time served for even the most serious offenses. And often, but not always, those offers proved too good for even these innocence-claiming defendants to reject. But in those rare cases in which a defendant rejected one of these generous plea deals, the defendant always prevailed in the end—either because the prosecutor capitulated and dismissed the case or because the defendant was acquitted at retrial. No innocence-claiming defendant in our study was reconvicted at a retrial.

Applying the trial-shadow theory to this data, this Article then seeks understandings about party behavior and the ways in which the plea-bargaining system is used to coerce pleas from the innocent. Part III considers the implications of this research for plea-bargaining policy and practice. Finally, Part IV begins to explore possible reforms for addressing the problems identified.

I. STUDYING AND THEORIZING PLEA BARGAINING AND ITS INNOCENCE PROBLEM

Empirically assessing plea bargaining's innocence problem presents both practical and theoretical problems. The *practical* problem is a ubiquitous one in innocence research: identifying a cohort of cases in which we can know that the prosecuted individual is actually innocent.[32] While that problem must be addressed in all innocence research, it is particularly challenging in research such as this, which attempts to study innocence cases prior to trial or prior to official exoneration. The second problem, the *theoretical* one, is the challenge of identifying a model or theoretical construct that accurately explains or predicts plea-bargaining behavior, which can then be used as a lens through which to examine and understand the bargaining behavior in the studied cases. Empirically assessing the nature and extent of any innocence problem in plea bargaining requires attention to both of these problems.

A. Finding the Innocent Among the Plea Bargainers

To address the challenge of identifying cases involving actually innocent defendants, we focus our empirical inquiry on cases in which innocence advocacy organizations (for our purposes, U.S.-based

32. *See, e.g.*, Jason Ralston, Jason A. Aimone, Charles M. North & Lucas Rentschler, False Confessions: An Experimental Laboratory Study of the Innocence Problem (Nov. 19, 2019) (unpublished manuscript) (on file with SSRN), https://ssrn.com/abstract=3483736 [https://perma.cc/3WRR-P7R6] ("The innocence problem, which occurs when an innocent person is falsely accused or convicted of a crime, is impossible to study with empirical data, because 'true' innocence and guilt are unobservable in the 'real world.'").

organizations that are all members of the Innocence Network[33]) have screened, investigated, and then *litigated* post-conviction claims of actual innocence based on new evidence of innocence. This group of cases no doubt is over-inclusive given that it is quite likely that not all of the defendants in these cases are actually innocent.[34] But a number of factors make this group of cases about as close as possible to cases in litigation with a high proportion of innocent defendants—and hence about as good as one can get for studying plea bargaining with innocent defendants.

First, Innocence Network member organizations are all dedicated to addressing only claims of actual innocence based upon compelling new evidence of innocence.[35] While their judgment about ground truth in a given case can be wrong, at least the cases they litigate reflect a philosophical bent and values bias that aim to target actual innocence.[36]

Second, the overwhelming caseload demands and limited resources available to these organizations mean they have to be picky—they can

33. The Innocence Network is an affiliation of nearly seventy innocence organizations around the world. *See Network Member Organization Locator and Directory*, INNOCENCE NETWORK, https://innocencenetwork.org/directory [https://perma.cc/WDA4-FU3J] (last visited Mar. 14, 2022). Approximately fifty-five of those organizations are based in the United States. *Id.* Each member organization is independent, but all agree to abide by certain ethical and professional standards and to focus the majority of their work on pro bono efforts to exonerate actually innocent and wrongly convicted individuals. For a history and description of the Innocence Movement, including the Innocence Network, see Keith A. Findley & Larry Golden, *The Innocence Movement, the Innocence Network, and Policy Reform*, *in* WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 93, 93–100 (Marvin Zalman & Julia Carrano eds., 2014); and ROBERT J. NORRIS, EXONERATED: A HISTORY OF THE INNOCENCE MOVEMENT (2017).

34. Our sample is of course also massively under-inclusive, given that there is no way to identify and include all cases involving innocent defendants involved in post-conviction litigation. Such under-inclusiveness is the very reason that research such as this employs representative samples. As noted *infra* Section II.A, analysis of our sample reveals that our sample is indeed appropriately representative of the broader pool of cases litigated by Innocence Network Member organizations. We can make no claim, however, that this sample is also representative of innocent individuals engaged in post-conviction litigation but who are not represented by Innocence Network member organizations.

35. *See, e.g.*, Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1102–09 (2003); *see also Become a Member*, INNOCENCE NETWORK, https://innocencenetwork.org/subcategory/become-a-member [https://perma.cc/V8HW-ET7E] (last visited Mar. 14, 2022) ("Organizations eligible for formal membership in the Innocence Network shall be limited to organizations that are dedicated to providing pro bono legal and/or investigative services to individuals seeking to prove their innocence of crimes for which they have been convicted and organizations solely dedicated to post-release support and empowerment of exonerees.").

36. *See, e.g.*, Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 231–32 (2006) ("These projects investigate and litigate claims of actual innocence on behalf of people wrongfully convicted of serious crimes.").

only afford to handle those cases with the strongest claims of innocence.[37] Russell Covey has argued that party behavior, beyond formal pleadings and bargaining assertions, can function as a kind of "signaling" mechanism that can reveal private information needed to assess the veracity of an innocence claim.[38] Covey's claim is that responses by a suspect to police interrogation can constitute that kind of signaling in criminal cases.[39] We contend that the commitment of resources by innocence advocates similarly serves a type of signaling function, which provides some measure of assurance of veracity in innocence claims.

Third, given these first two constraints, innocence organizations expend considerable effort screening cases at the initial intake stages, and then investigating them, before deciding to commit to litigation.[40] While a project may receive literally thousands of requests from inmates per year, it is not unusual for that project to litigate only a handful of cases. Those cases that make it to litigation have been vetted, examined, and tested repeatedly, all in a framework that is looking for actual innocence. An Innocence Project analysis revealed that on average it takes more than ten years to move a case from intake to ultimate exoneration.[41] While that vetting process is not foolproof, it is fair to say that no other entity in our legal system expends as much time and effort looking in depth for viable innocence cases.

Fourth, legal standards for reopening old cases impose onerous barriers that ensure that only the most meritorious claims proceed to litigation or to an order for a new trial. Those obstacles are well known and do not need to be recounted in detail here. Suffice it to say those

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37. *See* Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921, 925 (2002) ("[T]he high cost of proceeding on a case of alleged innocence and the limited resources for doing so makes the screening function for innocence projects an essential part of their work.").

38. Covey, *supra* note 1, at 95–103.

39. *Id.* at 110.

40. *See* Suni, *supra* note 37, at 925; Findley, *supra* note 36, at 267–68; *see generally* Medwed, *supra* note 35.

41. The Innocence Project conducted an analysis on over ten years of closed client cases, revealing that,

> on average, it takes: (1) over a year and a half for an innocent person to be convicted; (2) 10 years for them to write to the Innocence Project for help; (3) four years for their case to be evaluated and accepted (the demand for representation is far greater than the capabilities of the community of innocence advocates and, at least at the Innocence Project, there is a backlog); and (4) nearly six more years to find and test evidence, litigate, and secure exoneration and release.

Vanessa Meterko, *Strengths and Limitations of Forensic Science: What DNA Exonerations Have Taught Us and Where to Go from Here*, 119 W. VA. L. REV. 639, 646 (2016).

barriers include a variety of waiver and procedural default rules,[42] statutes of limitations,[43] and demanding substantive burdens for winning new trials on everything from newly discovered evidence to ineffective assistance of counsel,[44] *Brady* violations,[45] and free-standing claims of actual innocence.[46] Innocence organizations vet their cases with those standards in mind, so their judgments about innocence are necessarily reserved for the most compelling cases, and courts grant relief only when those onerous procedures and standards have been met.

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42. *See generally Wainwright v. Sykes*, 433 U.S. 72 (1977) (describing state procedural defaults and the barriers those defaults pose to federal habeas corpus review). Those procedural barriers are especially pronounced in guilty-plea cases, as many jurisdictions bar innocence-based post-conviction challenges if the defendant pled guilty or no contest. *See* Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 U.C. IRVINE L. REV. 671 (2020) (surveying the rules that bar innocence claims in guilty-plea cases in many jurisdictions and arguing that they unconstitutionally deprive criminal defendants of "the 'right to access the courts'").

43. *See* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 690–95 (2005).

44. *See, e.g.*, Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 ("Courts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable. In short, any 'lawyer with a pulse will be deemed effective.'" (footnotes omitted)). Indeed, Professor Brandon Garrett found that, even among individuals who were exonerated by DNA evidence—that is, actually innocent people—only 11% of their ineffective assistance of counsel claims were sustained by the courts. *See* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 601–02 (2009) (citing Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 96 tbl.5, 114 (2008)).

45. *Brady v. Maryland*, 373 U.S. 83, 86 (1963); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010). Indeed, a previous analysis I undertook of Garrett's data reveals that, even among individuals who were exonerated by DNA evidence—again, actually innocent people—only 17% of their *Brady* claims were sustained by the courts. *See* Findley, *supra* note 44, at 601.

46. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court rejected an argument that a freestanding claim of actual innocence was cognizable as a due process claim. *Id.* at 393. The Court did not wholly foreclose the possibility that execution of a demonstrably innocent person might violate due process but held that even if it did, the burden of proof on the condemned would be extraordinarily high:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 417.

Fifth, the data collected for this paper support the conclusion that the innocence advocacy organizations have done a good job of screening for actual innocence. As reflected in Figure 1 below, the data show that, in 199 of the 250 cases (80%) in which innocence organizations litigated claims of actual innocence to final resolution, the reviewing courts agreed with the innocence organization's assessment that the original convictions were flawed and reversed the convictions.[47] These numbers are especially remarkable given all the obstacles to post-conviction relief and the demanding standards for overturning convictions based on actual innocence that are imposed by the legal system (and all the cognitive biases that make it hard for system actors to imagine that initial assessments of guilt might be wrong[48]). Moreover, in 93 of the full cohort of 272 cases in this study, the *prosecutor* also agreed and joined in the request to vacate the conviction, or at least agreed not to oppose relief at the pre-adjudication phase of the post-conviction motion. And, in 184 of the 272 cases, the defendant was ultimately exonerated—either by way of acquittal, pardon, or dismissal of the charges.[49]

47. Of the 272 cases collected for this study, 250 post-conviction motions had been litigated to resolution at the time the data was collected. The courts vacated the convictions in 199 of those cases, while courts denied a new trial in only 29 cases. Ultimately, in those 199 cases, the charges were dismissed in 179, the defendant accepted a plea deal (after the new trial was granted) in 16, and the defendant was acquitted at the retrial in four. In another 22 cases, the litigation was still pending at the time of data collection, in 20 cases there was no resolution (e.g., because a plea offer was accepted prior to resolution of the post-conviction motion), and in one case the defendant was resentenced to time served. In one case, the defendant received a pardon.

48. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291.

49. For purposes of this Article, we use the definition of "exoneration" provided by the National Registry of Exonerations and most scholars. *See* Gross, Jacoby, Matheson, Montgomery & Patil, *supra* note 8, at 523–24; *see also* Findley, *supra* note 8, at 1162 ("The standard definition of 'exoneration' in the scholarly literature usually includes all cases in which a conviction was vacated based, in part, on evidence of innocence, by a court or executive, followed by no new trial or an acquittal at retrial.").

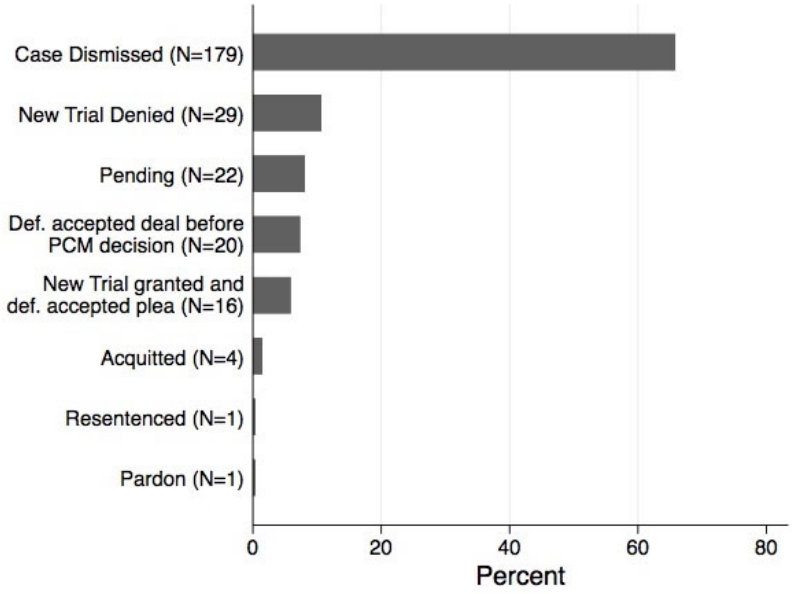

Figure 1. Outcomes of Post-Conviction Litigation. Outcomes of post-conviction claims litigated by innocence organizations, 2010–2020 (N=272).

Finally, there is simply no better proxy for actual innocence in cases that are still in litigation. Pretrial *claims* of innocence cannot define the cohort, because virtually every defendant initially enters a not guilty plea, and those cases that go to trial by definition involve at least a denial of guilt. Case *outcomes* also cannot be the sole defining criterion because the point of this study is to assess the role of plea bargaining in producing *false* case *outcomes*. Nor can agreement of prosecutors alone set the standard. If the study turned on the judgments of prosecutors, there would be no cases involving plea bargaining with innocent defendants, because no ethical prosecutor would admit to offering a plea bargain to a defendant the prosecutor has concluded is innocent; most prosecutors would agree that the ethical prosecutor must be convinced of guilt in order to prosecute.[50] Using prosecutorial agreement as the standard would reduce

50. *See* Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 551 (1987) ("The honorable prosecutor simply cannot believe that he is prosecuting the blameless."); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 641 (1999) ("[Justice-motivated prosecutors] must satisfy themselves of an individual's guilt as a precondition to determining that the conviction of an individual is an end to be sought on behalf of the state or the federal government."). Prosecutors also are not uniquely reliable arbiters of truth; some prosecutors have been notoriously resistant to recognizing innocence in old cases, even when confronted with compelling evidence of innocence. *See* Findley, *supra* note 8, at 1179–84 (providing examples of prosecutorial resistance to strong claims of actual innocence).

the sample size for this study to zero, but that cannot be correct or useful. Moreover, while many prosecutors in our cases recognized the validity of the innocence cases presented to them, the majority did not, and the record of prosecutorial resistance to innocence claims, even when innocence was ultimately established, cautions against relying exclusively on prosecutorial judgments.[51] Cases vetted by and then ultimately pursued through litigation by innocence organizations come as close as we can get to a collection of criminal cases with at least a high proportion of actually innocent litigants.

B. Theorizing Plea-Bargaining Practices in Innocence Cases

Finding cases to study gets us only partway to enabling meaningful inquiry into plea bargaining's effect on actually innocent defendants. We also need a methodology and an analytical tool to apply to the data from this group of cases.

This Article seeks to understand plea bargaining in innocence cases not by surveying participants about their strategies and goals, but by examining their actual behaviors. Survey research can be enlightening, as demonstrated recently by Wright, Roberts, and Wilkinson's recent survey of defense lawyers about their approaches to plea bargaining.[52] But such survey data can also be unreliable given that participants are not always fully aware of their own motivations and the perspectives that guide them, often subconsciously. As Bushway, Redlich, and Norris noted in their own survey-based empirical analysis of the trial-shadow model, such survey research has real strengths but also limitations, including concerns about external validity: "Actors may respond to questions in a hypothetical survey differently from how they would act when faced with the constraints of a real case, constraints that include the need to negotiate with other actors."[53]

This Article instead examines plea negotiation by looking at actual decisions made, and strategies undertaken, in cases involving a high (although not perfect) likelihood that the defendant was innocent. And to make sense of those decisions, the Article assesses them through the lens of the trial-shadow theory of plea bargaining.

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51. *See Findley*, *supra* note 8, at 1179–84.

52. *See* Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, 42 CARDOZO L. REV. 1295 (2021).

53. Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, *An Explicit Test of Plea Bargaining in the "Shadow of the Trial,"* 52 CRIMINOLOGY 723, 725 (2014). Their survey research involved providing hypothetical case facts to respondents (lawyers and judges) and then surveying them about "their best estimates for the three main components of the shadow of the trial: the probability of conviction at trial, the outcome at trial, and the plea deal they would advocate for in this situation (all within their own jurisdiction)." *Id.*

We use the trial-shadow theory of the market model of plea bargaining despite recognizing that the theory has its weaknesses. As others have observed, the trial-shadow/market model does not fully explain plea bargaining. To begin, it ignores a variety of other factors that influence bargaining decisions and impair market conditions. William Stuntz has explained that, "in a variety of ways and for a variety of reasons, criminal settlements do not efficiently internalize the law."[54] Stephanos Bibas has identified many of those reasons: "Agency costs; attorney competence, compensation, and workloads; resources; sentencing and bail rules; and information deficits all skew bargaining"; and "psychological biases and heuristics," such as "overconfidence, denial, discounting, risk preferences, loss aversion, framing, and anchoring," all "warp judgments."[55] Stephen Schulhofer has argued that agency costs and externalities plague plea bargaining and that, unlike true market systems, "no market-like solutions are available to protect either the public or the accused."[56] Moreover, the theory depends on an assumption that actors will act in rational ways, but behavioral economists and psychologists have shown repeatedly that people, including experts and professionals, often do not behave rationally.[57]

Stuntz adds another critique: it simply is not true that most prosecutors seek to maximize punishment in every case.[58] Rather, because the law provides prosecutors so many charging and dispositional alternatives—most of which individually or in combination would permit punishment that far exceeds what almost anyone would consider just—

54. Stuntz, *supra* note 25, at 2548.

55. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464, 2466–67 n.10 (2004) (first citing Mark Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 241–51; then citing Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 109–11 (1994); then citing Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 995–98 (1998); then citing Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 70–74 (1997); and then citing Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1222–23, 1243–44 (1992)).

56. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1990 (1992).

57. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING (1993); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

58. *See* Stuntz, *supra* note 25, at 2553; Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 765 (observing that prosecutors "have no inherent incentive to seek maximal punishment within the criminal process").

prosecutors get to leverage plea bargaining to suit their personal notions of justice and fairness.[59]

Looking at the other side of the bargaining table, Ronald Wright, Jenny Roberts, and Betina Cutaia Wilkinson have developed survey evidence suggesting that, while some defense lawyers by their own assessment do indeed bargain in the shadow of the trial, others claim to focus more on client-centered values—often non-legal considerations—that do not turn on the likelihood of conviction or the likely post-trial sentence. Wright, Roberts, and Wilkinson call this bargaining in the "shadow of the client."[60]

Why use the trial-shadow lens, then, when the theory is undoubtedly an incomplete model of plea bargaining? To start, there can be no question that the trial-shadow theory has some explanatory power: implicit in the very notion of bargaining is that the parties negotiate to mutually agreeable terms that minimize the perceived risks (and expenses) of going to trial. Anticipated trial outcomes unavoidably cast some shadow over the bargaining process. And indeed, research provides some empirical support for the trial-shadow theory.[61]

Moreover, despite its shortcomings, the trial-shadow theory is especially useful in our inquiry because it probably does a pretty good job of describing party behavior in the kinds of cases we are analyzing—the high-stakes cases that are typical in innocence litigation. While the trial-shadow theory cannot explain all plea-bargaining decisions or outcomes, it is widely recognized that it has its most purchase in serious cases such as murder and rape. In those cases, maximum sentences typically are not viewed as excessive (e.g., life sentences—or death—for murder, lengthy imprisonment or life for rape), and so prosecutors routinely seek those maximums or other extreme sentences. At the same time, the seriousness of the potential punishment makes it much more likely that defendants will also be motivated primarily by legal concerns (i.e., concerns about the likelihood of conviction and the likely penalty) and will bargain primarily to limit exposure to maximum or other onerous punishments. In that scenario, the parties are most likely to behave as trial-shadow theory predicts.

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59. Stuntz, *supra* note 25, at 2553–54; *see also* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1312 (2018) ("[P]rosecutors rarely want to maximize [sentences], hoping instead to obtain only their *preferred* sentence.").

60. *See* Wright, Roberts & Wilkinson, *supra* note 52, at 1299–1300, 1313.

61. *See* Bushway, Redlich & Norris, *supra* note 53, at 740–41, 740 tbl.3, 750; Shawn D. Bushway & Allison D. Redlich, *Is Plea Bargaining in the "Shadow of the Trial" a Mirage?*, 28 J. QUANTITATIVE CRIMINOLOGY 437 (2012). *But see* David S. Abrams, *Is Pleading Really a Bargain?*, 8 J. EMPIRICAL LEGAL STUD. 200 (2011) (finding that the average plea-based sentence in this study was actually higher than the average expected sentence after trial).

It is precisely that type of serious, high-stakes case that also draws most of the attention of innocence advocates and the innocence movement. In our dataset, for example, innocence organizations reported litigation that focused almost exclusively on the most serious types of cases and longest sentences. Seventy-five percent of our cases (205/272) involved some degree of homicide or attempted homicide; 23% (64/272) involved adult sexual assault; 7.7% (21/272) involved child abuse, including child sexual abuse; and 34% involved an adult violent crime less than homicide. Only 15% (41/272) involved a nonviolent crime. Note that the percentages here do not add up to 100 because defendants can be prosecuted for more than one type of offense. Therefore, any given case might have multiple offenses. The upper bound of the original sentences imposed ranged from death (1.5%) and life in prison (48%) to zero years for the least serious case (0.4%). For a breakdown of the cases in our dataset by sentence, see Figure 2 below. Innocence cases, therefore, provide an especially useful cohort of cases in which to empirically assess, under the trial-shadow theory, the risk that plea bargaining might be producing wrongful convictions. This Article undertakes that empirical examination.

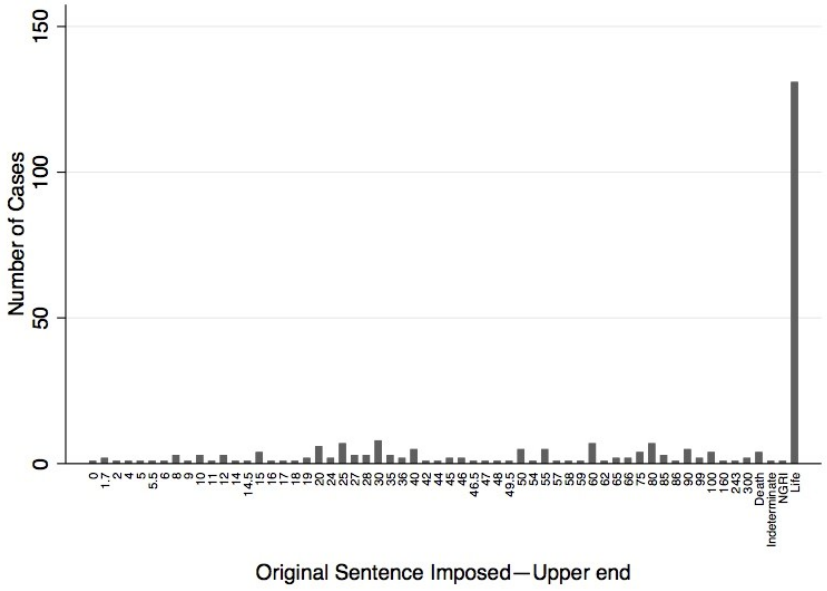

Figure 2. Distribution of Sentences Initially Imposed

In important ways, bargaining in high-stakes criminal cases resembles bargaining in civil cases, in which the trial-shadow theory is most widely accepted. Indeed, it may be even more applicable in innocence litigation. According to Stuntz, the trial-shadow theory probably captures bargaining in civil cases pretty well, because there—as

theorized—the parties are mutually motivated to maximize benefits (the plaintiff will always seek the greatest damages possible, and the defendant will seek to reduce damages as much as possible); few other interests—if any—overshadow those motivations; information needed for efficient bargaining is provided by extensive civil discovery; and the law, as applied by the jury (or judge), fully defines the outcome.[62] Either the defendant committed a tort or they didn't; either the defendant infringed a patent or breached a contract or they didn't. And the remedy flows directly from any finding of liability (as applied and interpreted by the jury or sometimes by a judge).

But that does not so neatly describe negotiating in most criminal cases. In criminal cases, the proliferation of criminal offenses in the statutes means the law gives prosecutors a menu of potential crimes to charge and potentially massive sentences that often far exceed what any prosecutor would actually seek to impose.[63] Hence, the law does not dictate possible outcomes. Rather, the law gives the prosecutor multiple choices about what outcomes to pursue. Stuntz explains,

> Civil laws define obligations; those obligations in turn define litigation outcomes. Parties bargain in the shadow of those outcomes, hence in the law's shadow. Some of criminal law works like that. But for the most part, criminal law and the law of sentencing define prosecutors' options, not litigation outcomes. They are not rules in the shadow of which litigants must bargain. Rather, they are items on a menu from which the prosecutor may order as she wishes. She has no incentive to order the biggest meal possible. Instead, her incentive is to get whatever meal she wants, as long as the menu offers it. The menu does not define the meal; the diner does. The law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges.[64]

In this regard, it is worth noting that this feature of the bargaining process likely enhances the coercive power that prosecutors can wield in ways that exacerbate plea bargaining's innocence problem. As Andrew Manuel Crespo has explained, plea bargaining is inherently coercive for two fundamental reasons:

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62. *See* Stuntz, *supra* note 25, at 2548–49.

63. *See supra* notes 58–59 and accompanying text.

64. Stuntz, *supra* note 25, at 2549. In this regard, Stuntz observes, "[t]his points to a basic irony about criminal law: the more it expands, the less it matters." *Id.* at 2550.

> First, while defendants always want to minimize their potential sentences, prosecutors rarely want to maximize them, hoping instead to obtain only their preferred sentence, in the most efficient way possible. This asymmetry allows prosecutors to trade away "extra" years of incarceration that the defendant desperately wants to avoid but that the prosecutor doesn't particularly value. As for the second problem: This free leverage is typically overwhelming, because most criminal codes authorize sentences much higher than what a typical prosecutor—or a typical person, for that matter—would actually want to see imposed in a given case. Thus, by threatening a seriously inflated set of charges and then offering to replace it with the charges that she truly desires, the prosecutor is able to control the defendant's incentive to plead guilty, and with it the outcome of any subsequent "negotiation." In the aggregate, prosecutors so empowered can obtain more convictions, with longer sentences, at lower costs—all preconditions for mass incarceration.[65]

For these reasons, Stuntz concludes, "For some crimes, the law may have *no* effect at the margin. That is quite different from the world of civil settlements."[66] In most criminal cases, Stuntz points out, three factors undermine the trial-shadow theory: "First, prosecutors do not try to maximize total prison time. Second, due to docket pressure, prosecutors lack the time to pursue even some winnable cases. And third, the legally authorized sentence is harsher than the sentence prosecutors want to impose."[67] When any one of these factors, or even all three, are present, "the law—both substantive criminal law and the law of sentencing—casts a very small shadow on plea bargaining."[68]

Yet this critique of the trial-shadow theory of plea bargaining has less salience in that small group of criminal cases that involves particularly violent behavior—the cases in which the stakes are highest and the punishments harshest—the very cases examined in the present study.[69] As Stuntz observes, "In murder cases, prosecutors generally pursue every case they can . . . ."[70] Moreover, "prosecutors probably try to maximize punishment in murder cases—not counting death sentences—partly

65. Crespo, *supra* note 59, at 1311–13 (footnotes omitted).

66. Stuntz, *supra* note 25, at 2549.

67. *Id.* at 2553–54.

68. *Id.* at 2554.

69. *See supra* fig.2 and accompanying text.

70. Stuntz, *supra* note 25, at 2563. This, he observes, probably explains in part why the acquittal rate is so much higher in murder cases than in other types of cases. *Id.* (citing BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2000, at 463 tbl.5.53 (Kathleen Maguire & Ann L. Pastore eds., 2001)).

because the public wants the harshest possible punishment in those cases, and partly because the prosecutors themselves believe it just."[71] Although Stuntz does not identify them in particular, stranger sexual assaults today are likely subject to the same pressures and responses.[72] In serious violent cases such as these, Stuntz says, "[p]lea bargains fall squarely in the law's shadow."[73]

In another way, plea negotiations in innocence litigation reflect trial shadows more clearly than negotiations in most other kinds of cases. In criminal post-conviction litigation—the stuff of innocence cases—much of the guesswork about trial outcomes—the size and shape of the trial's shadow—is a known. In civil cases, by contrast, while the parties are motivated to seek the most they can from the litigation, they bring little more than an educated guess about the trial outcome to settlement

71. Stuntz, *supra* note 25, at 2563.

72. Although sexual assault historically has been—and for some types of offenses continues to be—under-prosecuted, attempts have been made in recent decades to change that. *See, e.g.*, Jan Ransom, *'Nobody Believed Me': How Rape Cases Get Dropped*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/07/18/nyregion/manhattan-da-rape-cases-dropped.html [https://perma.cc/JH74-G9TX]; *see also* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017) (providing an illuminating account of the challenges to prosecuting rape, particularly in "he said/she said" cases that typically focus on issues of consent). While under-prosecution remains prevalent in such cases, "[r]ape reform became a prominent goal during the feminist movement in the 1970s" to remove barriers to prosecution and conviction. Daniel Belcher, *The War on Rape? The Implications of Setting Mandatory Minimum Sentencing for Rape and Sexual Assault Convictions*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 165, 177 (2017). Some rapes, such as stranger rapes—the type of especially violent offense most frequently involved in innocence organization litigation—have long been prosecuted and punished quite harshly, especially those involving Black defendants and white victims. Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 1–3 (2006). Historically, "the rape of a White woman by a Black man was treated with especial violence." *Id.* at 1. Indeed, "studies from 1930 to 1950 show that rape made up 11.1% of the total number of death sentences, second only to murder." *Id.* at 26 (citing Frank E. Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 10 (1952)). Although Blacks make up just 13.4% of the general population (compared to 76.3% that is white), U.S. CENSUS BUREAU, *Quick Facts U.S.* (July 2021), https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/38M5-3WBE], and "are incarcerated in state prisons at nearly 5 times the rate of white Americans," THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021), https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/RK3X-YRVV], as of 2021 they comprised 59% of the known exonerations in sexual assault cases. As of March 2022, the National Registry of Exonerations knew of 206 cases in which Blacks had been wrongly convicted of sexual assault, compared to 116 cases for whites and another 23 involving Hispanics. *Exonerations By Race/Ethnicity and Crime*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsRaceByCrime.aspx [https://perma.cc/2GL7-F2F6] (last visited Mar. 6, 2022).

73. Stuntz, *supra* note 25, at 2563.

negotiations. Indeed, one criticism of the trial-shadow model of negotiation in civil cases is that attorneys are not actually good at predicting civil jury verdicts.[74] In most criminal cases as well, even once the prosecutor selects a charge from the menu of available options and decides on an appropriate punishment, the outcome—both in terms of the nature and number of convictions and the sentence the court ultimately imposes—remains at best an educated guess. But in innocence litigation, the defendant has already been tried once and lost and hence has been subjected to a penalty. As the case moves to post-conviction litigation or to a retrial, the trial penalty is known. The parties bargain, discounting the anticipated trial outcome, knowing precisely what that outcome has already been. And while there is no guarantee that the penalty following a retrial and reconviction would be identical, it provides a firm anchor from which the parties negotiate. Any agreed-upon reduction in sentence below that known penalty therefore serves as a good measure of the parties' assessments of the likelihood of reconviction.

Frank Easterbrook has recognized the power of the trial-shadow theory in analogous retrial situations:

> In some cases the trial process itself establishes a benchmark against which to measure the contention that the differential is coercive. When, for example, a trial is held and a sentence imposed, we may conclude that a subsequent, higher sentence after a new trial or plea is a "penalty," unless there is a strong legitimate explanation for the difference. In most cases, though, no such benchmark is available.[75]

In post-conviction innocence litigation, that benchmark is indeed available.

The trial's shadow still does not explain everything about plea negotiations in innocence cases. Prosecutors no doubt offer added discounts, entirely apart from their assessment of the likelihood of acquittal (or conviction) after a trial, based on an assortment of other considerations. In post-conviction or retrial contexts, for example, prosecutors might offer added discounts to avoid the costs of an additional trial, to spare alleged victims the pain of a retrial, or simply out of sheer case fatigue. But given the serious nature of most of these innocence cases, it is unlikely that these factors account for the bulk of the large plea discounts reflected in our data.

The trial-shadow theory also seems particularly apt when viewing innocence cases from the defense perspective. If we assume that most or at least a significant number of the defendants in the innocence cases are

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74. *See* Galanter, *supra* note 55, at 211.

75. Easterbrook, *supra* note 24, at 312 (footnote omitted).

indeed innocent, they have an added impetus to resist plea bargains. As one would expect, laboratory studies confirm that, while innocent individuals can be induced to plead guilty at alarming rates, they do indeed plead at a lower rate than guilty people.[76] At the same time, the risks of conviction are no doubt especially palpable for innocence case litigants: having lost once already, innocent defendants in this posture are keenly aware of the risks of trial and the attendant trial penalty. And there is reason to believe that, even for those who have not yet been tried once, innocent defendants might be particularly risk averse.[77] Plea bargains among these potentially innocent defendants, especially when extraordinarily steep plea discounts from the known trial outcomes are offered, provide strong evidence that the trial penalty looms large and that bargaining is indeed undertaken in the shadow of that trial penalty.

II. PLEA BARGAINING IN INNOCENCE CASES: THE DATA

A. Methodology

For this Article, we reached out to every U.S. member organization of the Innocence Network, asking each to provide anonymized case data for each case they had litigated between 2010 and 2020. We began by reaching out to the Network's Research Committee to request authorization to send information requests to the network's members.[78] Once the Committee authorized the data collection, the Network sent an email to each Network member organization notifying each project that we would be requesting anonymized case data. The data requests were sent via email and consisted of a two-page questionnaire that we asked each member to fill out for each case litigated.[79] We collected the data progressively, as not all member organizations replied to our request simultaneously and some did so partially. Those who did not reply to our request were contacted again via email in an attempt to increase the response rate.

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76. Wilford, Wells & Frazier, *supra* note 3, at 554; Dervan & Edkins, *supra* note 3, at 34; Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCH. 59, 66 (1984); Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 LAW & HUM. BEHAV. 611, 616 (2016); Avishalom Tor, Oren Gazal-Ayal & Stephen M. Garcia, *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97 (2010); Miko M. Wilford & Gary L. Wells, *Bluffed by the Dealer: Distinguishing False Pleas from False Confessions*, 24 PSYCH. PUB. POL'Y & L. 158, 163 (2018).

77. Bibas, *supra* note 55, at 2509–10.

78. This research was also approved by the University of Wisconsin Institutional Review Board (as exempt from human subjects review protocols).

79. Questionnaire available in the Appendix.

At the time the information requests went out, there were 56 U.S.-based member organizations. We were able to contact 53 of them, and 32% of those we contacted responded to our information request. While this rate may seem low, it is at the upper end of typical survey response rates.[80] These projects represented all geographical regions of the country and included some of the largest and oldest projects, as well as some of the smallest and newest projects. Moreover, because this cohort includes many of the largest and most active projects, the data it submitted probably represent a significant majority of all cases litigated by Innocence Network member organizations over the past decade.

To address concerns about nonresponse bias and the representativeness of the sample, we collected data for all projects in our sampling frame[81] about their staff size, budget size, and success rates, as measured by number of exonerations, vacated convictions, *Alford* pleas,[82] paroles, and sentence reductions achieved in 2019. We also collected data on population estimates for the project locales to compare potential case workloads.[83] We consider that these covariates might affect plea bargain outcomes. Thus, comparing the projects that replied to our information request to those that did not along these variables allows us to determine whether the projects that replied to our information request differ significantly in capacity from those that did not respond. If there were significant differences between these two groups, these differences would suggest our results were not representative of the universe of projects and might be biased.

To assess the differences between the in-sample and out-of-sample Innocence Projects, we estimated an OLS regression to determine whether projects were more likely to respond or not to our information request as a function of the covariates previously mentioned. The results of the regression show that none of the covariates determine a project's (lack of) response to our request. The results of the OLS regression analysis are set forth in full in Table B, found in the Appendix. The results show that projects that achieved a sentence reduction were more likely than others to respond to our information request (p-value = 0.023). This suggests that the results of our empirical analysis will be representative of projects that show a greater rate of success in sentence reductions. Yet, when we re-estimate these results via logit regression, achieving sentence reductions is no longer significant at conventional levels. Also, when including

80. *See* Tse-Hua Shih & Xitao Fan, *Comparing Response Rates in E-mail and Paper Surveys: A Meta-Analysis*, 4 EDUC. RSCH. REV. 26 (2009).

81. Our sampling frame, that is, the list of all possible units of analysis from which our sample is drawn, corresponds to all Innocence Project members.

82. *See North Carolina v. Alford*, 400 U.S. 25 (1970).

83. Project-level data come from the Innocence Network. Data on population estimates correspond to the 2018 U.S. Census Bureau data.

location-fixed effects to our first OLS regression to account for variation across projects within the same location, the coefficient for sentence reductions is not statistically significant. The number of active volunteers increases its statistical significance slightly, but it still is not significant at conventional levels.

These results suggest that the projects that responded—that is, our in-sample projects—do not differ in important ways from the projects that did not respond across these covariates. As such, we expect the results in our empirical analysis to travel to projects out of sample.

B. The Data

From the questionnaires sent out to the innocence organizations, we were able to collect data on the offense(s) the defendants committed, the original sentence and time served—from which we estimated the years remaining on their sentence—whether a plea offer was made before the original conviction, the type of new evidence that led to the post-conviction litigation, the response of the prosecution to the post-conviction motion (PCM), the negotiation outcome prior to the resolution of the PCM, and the outcome of the post-conviction litigation. If the PCM led to a new trial, we also collected data on the prosecution's response to a new trial—including whether the prosecutor offered a plea bargain—the defendant's response to a plea offer if any was made, and the outcome of the retrial. The data collection instrument (questionnaire) and the data distribution for all variables are available in the Appendix.

As an overview of the cases, after an innocence organization filed a PCM but prior to the court's adjudication of that motion, 14% of prosecutors offered a plea deal (39 cases in our dataset).[84] After the PCM was granted, the plea bargain rate was 13%, corresponding to 27 cases.[85] In 4 of these 66 instances of plea offers, prosecutors offered a plea deal both before and after a PCM was adjudicated. These patterns led to an overall plea-bargain offer rate of 23%.

From these 66 plea offers, we have data on the reduction rates for 63 cases. According to these data, prosecutors on average offered to knock off almost half of the original sentences—the plea offers amounted on average to 55% of the defendants' original maximum sentence. In other words, prosecutors offered on average a 45% reduction in the original sentence.[86] Moreover, these plea offers entailed a reduction in the number

84. Thirty-four percent joined the PCM and 47% opposed the motion.

85. Eighty percent dismissed the case and 14% opposed the motion.

86. For defendants originally sentenced to life in prison, we followed the convention set by the U.S. Sentencing Commission, which counts any sentence of 470 months (just over 39 years) or greater to be a life sentence. *See* U.S. SENT'G COMM'N, LIFE

of remaining years on the sentences, such that the remaining years represented on average 6% of the years the defendants had remaining on their original maximum sentence. In 88% of the cases, the effective remaining years on the sentence derived from the plea offer were zero, as most prosecutors offered time served.

Although many of the defendants in our sample had been in prison for years before the innocence litigation began, the plea offers to time served still represented strikingly large concessions—effectively erasing 90% of the total time the defendants had left to serve on average. For all cases, the defendants had served an average of 14.7 years but still had remaining an average of 36.4 years to serve on the upper end of the sentences originally imposed. Yet prosecutors frequently offered time served in their plea deals, even though that represented disregarding on average 45% of the original sentence. This offers some preliminary evidence supporting the trial-shadow model, suggesting prosecutors recognized the weakness of their case, as they reduced bargained-for penalties substantially. It also offers some support for the concern that some prosecutors are using their leverage in plea bargaining to preserve convictions in serious cases, even when they know the chances of conviction at a trial are quite low and hence the possibility of innocence is unusually high.

Additionally, the data suggest that prosecutors offered plea deals across all types of offenses except for attempted homicide at the pre-adjudication phase of the post-conviction motion.[87] A similar pattern occurs once a new trial is granted. While in a majority of the cases prosecutors did not offer a plea deal, they did so in a sizable number of cases (23%) and across different types of offenses. Table 1 below shows the number of offenses by type for which prosecutors offered a plea deal both prior to the resolution of the post-conviction motion and after a new trial was granted. Note here that the total number of offenses is greater than our number of cases because defendants can be prosecuted for more than one type of offense. The last row of the table shows the plea offer rate estimated for the total number of cases instead of the count and type of offenses.

SENTENCES IN THE FEDERAL SYSTEM 10 (2015), https://www.ussc.gov/research/research-publications/life-sentences-federal-criminal-justice-system [https://perma.cc/7NL5-6MPY]. Because this is the minimum number of years the Sentencing Commission considers to be a life sentence, adopting this as the life-sentence equivalent represents a conservative estimate of the effective length of a life sentence for purposes of our analyses.

87. A two-side Fisher's exact test on the significance of association between offering a plea deal prior to a PCM and attempted homicide suggests that the two variables are independent at conventional levels of significance (p-value = 0.05) (Two-sided Fisher's exact = 0.09).

Table 1. Type of Offense and Plea Deal Offers

	Count of offenses and plea offers prior to resolution of PCM by offense		Count of offenses and plea offers in response to new trial		Total Plea Offer Rate
	Offered Plea	No Plea Offer	Offered Plea	No Plea Offer	Offered Plea
Attempted Homicide	0	20	3	8	9.7%
Child Abuse	1	6	3	3	30.8%
Murder	25	138	14	101	13.4%
Nonviolent	4	37	2	27	8.6%
Other Homicide	6	16	4	10	27.8%
Other Violent	21	72	15	54	21%
Sexual Offense – Adult	10	54	3	50	11.1%
Sexual Offense – Child	1	13	1	11	7.7%
All Cases	39	233	27	175	23%

While offering a plea deal is a relatively low-frequency event, it happens across the spectrum of sentences that defendants receive. Figure 4 shows the distribution of plea offers prior to a resolution of a PCM across categories of maximum years of sentence. Similarly, Figure 5 shows the distribution of plea offers in response to new trial by original sentence. These figures show that among cases brought by Innocence Network organizations, pleas are offered at similar rates across the sentencing distribution.

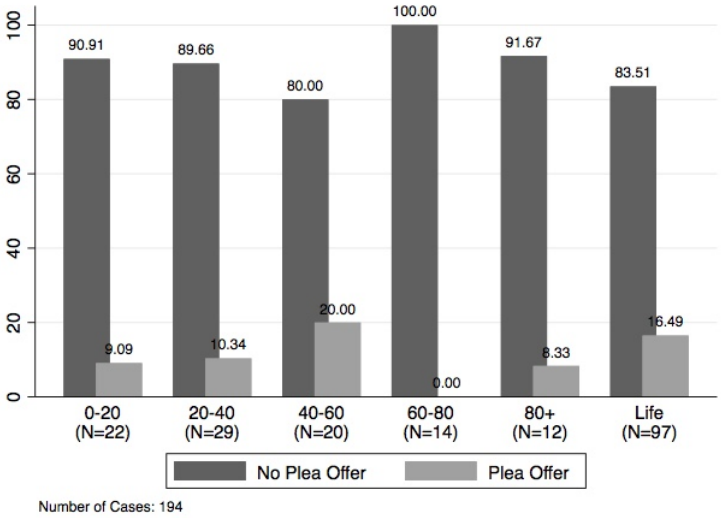

Figure 4. Plea Prior to Resolution of PCM by Original Sentence

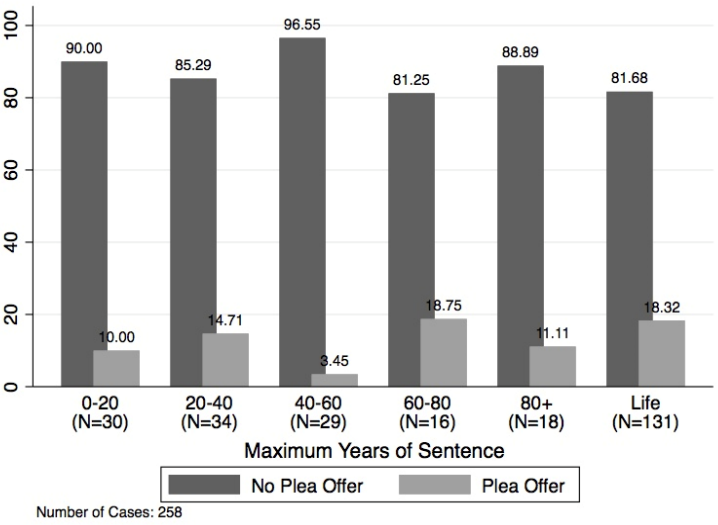

Figure 5. Plea Offer in Response to New Trial by Original Sentence

The data also show some variation in how defendants responded to plea offers, and their responses offer additional preliminary evidence supporting the prevalence of an innocence problem. At the pre-adjudication phase, defendants rejected 46% of the plea offers (18/39). At the post-PCM phase, defendants rejected 41% (11/27) of the plea offers. Overall, defendants rejected 44% of the plea offers (29/66), but that means that defendants accepted 56% of the offers despite their claims of innocence. Yet in 61% (11/18) of the cases in which defendants rejected the plea offer at the pre-adjudication phase, the convictions ultimately were vacated. Of the 18 cases in which defendants rejected pre-adjudication plea offers, three cases were denied a new trial, eleven cases were dismissed, one case was granted a new trial but the defendant ultimately accepted a plea deal, and one case is registered as pending.[88] Similarly, in 80% of the cases in which defendants rejected the plea offer at the post-PCM phase, the convictions were vacated: nine cases were dismissed, and the other two cases were still pending at the time of our analysis.[89]

Breaking this data down further, we find that there was widespread success of innocence claims in our sample, as well as significant prosecutorial support for many such claims. But the data also reveal prosecutorial resistance in other cases, often accompanied by surprisingly generous plea offers apparently designed to preserve vulnerable convictions. As reflected below in Figure 6, 199 of the 272 cases studied (73%) resulted in a new trial. In those cases, four defendants were

88. In 11/18 cases, a plea offer was rejected at the pre-adjudication phase.

89. In 9/11 cases, a plea offer was rejected at the post-PCM phase.

acquitted at a new trial and 16 accepted a plea deal. In addition to those cases, one case was dismissed under a unique state law permitting a finding of actual innocence, one was resolved through resentencing, 20 were settled via plea bargain before the post-conviction motion was adjudicated, and 22 cases were still pending at the time the data was collected. Of those cases that reached a final resolution (250 cases), 80% of resolved cases resulted in a new trial or outright dismissal, and another 8% obtained some other form of relief (mostly via plea bargain), meaning defendants obtained some relief in a total of 88% of the cases. In stark contrast, only 29 cases (11% of the total, or 12% of the cases litigated to resolution) resulted in a denial of any relief.

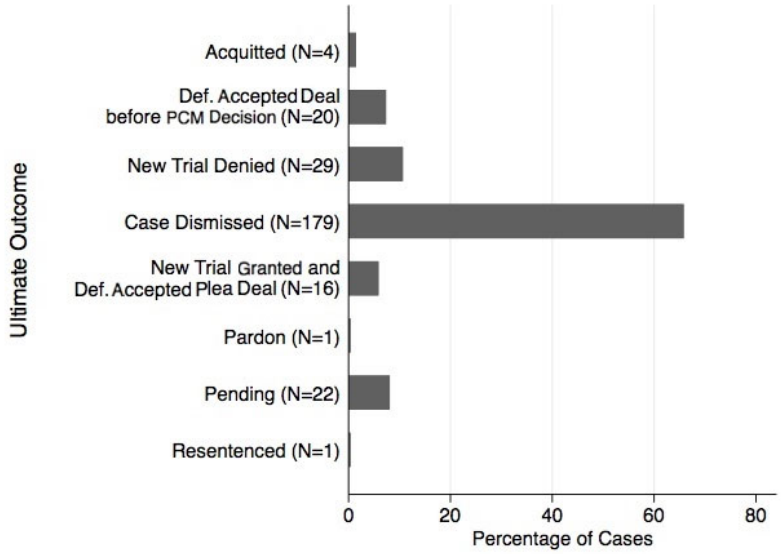

Figure 6. Ultimate Outcome

The data reveal prosecutorial awareness of at least some merit in the majority of the defense claims. In their responses to innocence claims, prosecutors fully opposed the defense motions in fewer than half of the cases (128, or 47%). In the other 144 cases (53%), prosecutors responded in a way that signaled an awareness of vulnerability in the conviction. In 93 cases (34%) prosecutors either joined in the defense motion or did not oppose it. In another 12 cases (4%), prosecutors initially opposed relief but then ultimately dropped their opposition and joined in the defense request, meaning that, in total, prosecutors conceded relief in 38% of the cases. Interestingly, in 39 cases (14%), prosecutors offered plea bargains prior to the final disposition of the post-conviction proceedings—that is, while the merits of the request for a new trial were still being litigated—again suggesting awareness of the vulnerability of the convictions. Figure

7 reflects the proportion of each type of prosecution response to the post-conviction motions.

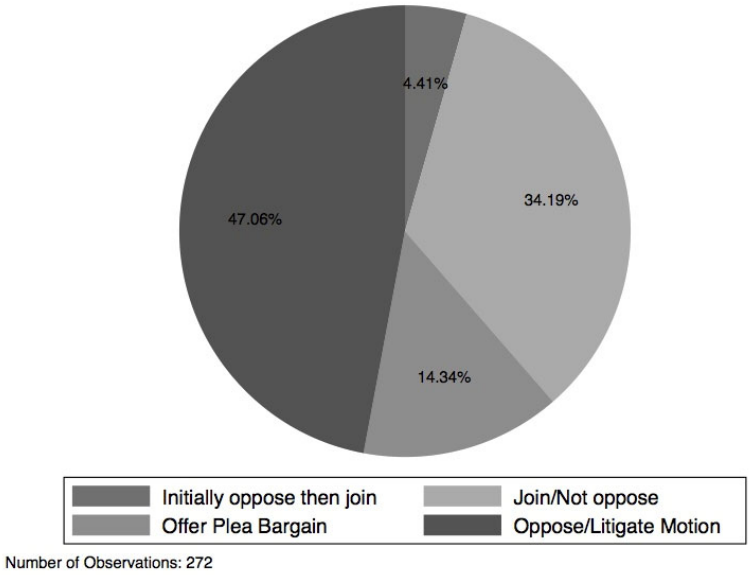

Figure 7. Prosecution's Response to PCM

In those cases that advanced to full litigation and in which courts ultimately granted a new trial, prosecutors had a range of options they could pursue. While the most common response from prosecutors after a conviction was reversed was to dismiss charges (160 of 202 cases, or 79%), the second most common response was to offer a plea bargain (27 cases, or 13%). In only 14 of the cases in which courts had granted new trials (7%) did prosecutors assert they were going to retry the defendants. Figure 8 reflects the totals of the prosecution responses after courts granted new trials.

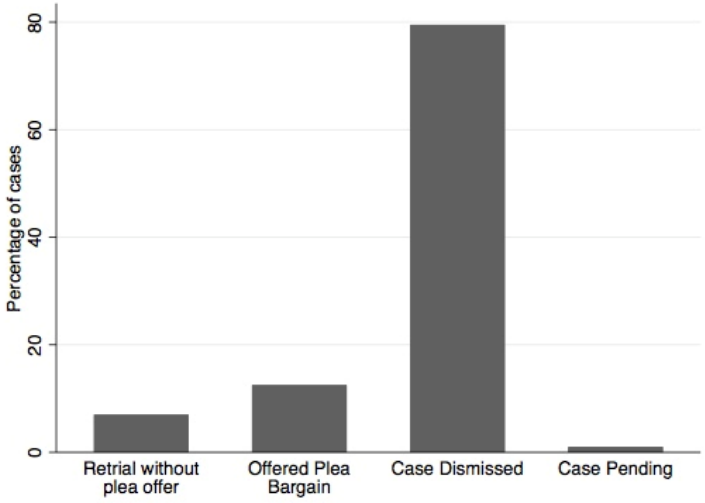

Figure 8. Prosecution Responses After Courts Granted New Trial

In that small proportion of cases in which prosecutors pledged to retry the defendant without making any plea offer (a total of 14 cases), only four of them (28.6%) actually went to a retrial, and all four resulted in acquittals. Of the remaining ten cases, one is pending, and in the other nine cases (64.3%) the charges were dismissed prior to retrial. No defendant was convicted at a retrial. Figure 9 shows the distribution of outcomes for these cases.

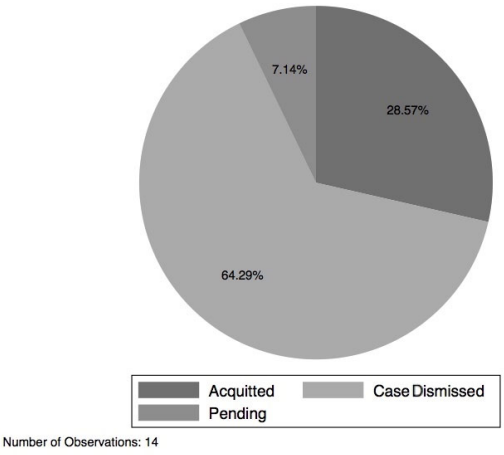

Figure 9. Outcomes for Retrials Without Plea Offer

Perhaps equally telling regarding plea bargaining's potential innocence problem is the nature of the discounts offered in these post-

conviction innocence cases. The plea discounts prosecutors offered were uniformly steep, again reflecting an apparent prosecutorial judgment that the likelihood of conviction after a retrial was quite low (an assessment that appears to be validated by the high rate of acquittal that followed in the few cases that prosecutors did ultimately take to retrial). In 61% of the cases in which pleas were offered in the post-conviction process, the plea offers were to time served. If the trial-shadow theory has explanatory power here, it suggests that prosecutors recognized the weakness of their cases and that the likelihood of conviction at retrial was exceedingly low, if not zero.

To the extent that our data suggest that the threat to innocence in plea bargaining arises because prosecutors offer substantially higher plea discounts to defendants with strong defenses and a good chance of acquittal, it is consistent with other empirical research.[90] A study by Ronald Wright provides additional evidence that steep plea discounts have this distorting effect on case outcomes, which can ensnare innocent defendants.[91] Wright found that federal district courts that grant extensive sentencing discounts under the Federal Sentencing Guidelines for "acceptance of responsibility" and for providing "substantial assistance" to law enforcement—both typical features of plea bargains—had higher rates of guilty pleas than other districts *and* also lower rates of acquittals.[92] Wright concluded that these data together probably indicate that defendants are abandoning meritorious trial defenses because of the steep discounts they receive for their guilty pleas.[93]

C. Strategic Bargaining—Before and After PCM Adjudication

One important assumption of the trial-shadow theory is that prosecutors behave strategically, if not opportunistically. One observable implication of this assumption is that there should be a relationship between their responses to a PCM or new trial and the specific traits of the cases they prosecute. If prosecutors are being strategic about offering plea deals, considering costs and benefits, we hypothesize that prosecutors might be more likely to offer a plea deal depending on the nature of the

90. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 714–15 (1981) [hereinafter Alschuler, *The Changing Plea Bargaining Debate*]; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) (noting that "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent"); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2295 (2006).

91. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 85–86 (2005).

92. *Id.*

93. *Id.*

offense and original sentence.[94] In other words, prosecutors might be more willing to offer a plea deal when the offense entails a steeper sentence because they have more room to bargain. On the other hand, we also recognize that some prosecutors might not be operating just strategically to retain convictions: ethical prosecutors, when confronted with powerful new evidence of innocence, might be more likely to dismiss the case without a plea offer because they recognize that the defendant might indeed be innocent and that they cannot prove guilt and should not try. We see evidence of both in our data.

1. PRE-ADJUDICATION PLEA BARGAINING

We explore what might explain the prosecution's decision to offer a plea deal at the pre-adjudication phase of the post-conviction process via an OLS regression. The dependent variable in this model is a dichotomous indicator for whether the prosecution responded to a PCM by offering a plea deal. The independent variables of interest correspond to the nature of the offenses for which the defendant is prosecuted,[95] the years served,[96] the maximum number of years remaining to serve, the maximum years of sentence originally imposed,[97] the nature of the new evidence leading to

94. Strength of evidence in the case would of course also be an important variable, but we do not assess that, as we have no access to the evidence in the cases and no way to assess its strength.

95. Defendants can be prosecuted for more than one type of offense. To account for the one or multiple types of offenses for which a defendant was prosecuted, the model includes a set of dichotomous indicators, one for each type of offense, taking the value of one if the defendant was being prosecuted for the given type and taking the value of zero if otherwise. Thus, there is no baseline category for type of offense. Rather, for each indicator, the baseline is the absence of that given type of offense in the records of a case amongst the offenses for which each defendant was prosecuted.

96. The model includes a set of dichotomous indicators, one for each type of offense, taking the value of one if the defendant was being prosecuted for the given type and taking the value of zero if otherwise.

97. As noted in note 86 *supra*, for defendants originally sentenced to life in prison, we followed the convention set by the U.S. Sentencing Commission, which counts any sentence of 470 months (just over 39 years) or greater to be a life sentence. Again, because this is the minimum number of years the Sentencing Commission considers to be a life sentence, adopting this as the life-sentence equivalent represents a conservative estimate of the effective length of a life sentence for purposes of our analyses. We coded NGRI, indeterminate, and death sentences as missing values to avoid assigning an inaccurate equivalent in years.

the PCM,[98] and the total number of new pieces of evidence available.[99] As a robustness check, we reestimate this model via logit and probit regressions. The results are robust to these model specifications; the full results are in Table C in the Appendix.

The results of this exploratory analysis via OLS regression are in Table 2 below. The results allow us to identify not the causes but the correlates of plea bargaining. The coefficient for each variable in our model represents the amount of change in the likelihood of offering a plea deal for every one-unit increase of its corresponding variable. Positive coefficients indicate a positive correlation with the dependent variable, and negative coefficients indicate a negative correlation with the dependent variable. The coefficients that are statistically different from zero—and therefore have some leverage in the likelihood of offering a plea deal—are marked with their corresponding level of statistical significance.

Table 2. Exploratory Analysis—Prosecution's Response at Pre-Adjudication Phase

VARIABLES	(1) OLS
Attempted Homicide	-0.143**
	(0.0574)
Child Abuse	0.0535
	(0.153)
Murder	0.116**
	(0.0548)
Nonviolent	0.128*
	(0.0712)
Other Homicide	0.133
	(0.0898)
Other Violent	0.150***

98. We use the same coding strategy for new type of evidence as we did for type of offense. Each case could register more than one type of new evidence. Thus, the model includes a set of dichotomous indicators, one for each type of new evidence, taking the value of one for each type of new evidence when registered in a case and taking the value of zero otherwise. There is no baseline category for type of new evidence. Rather, for each indicator, the baseline is the absence of that given type of new evidence.

99. As noted, strength of evidence is no doubt an important variable, but we have no data that permit us to assess strength of evidence or to estimate its impact on plea-bargaining decisions.

	(0.0534)
Sexual Offense – Adult	0.0988 (0.0628)
Sexual Offense – Child	0.0788 (0.141)
Years Served	0.00472 (0.00305)
Max Years Remaining	0.00119 (0.00154)
Sentence – Upper Bound	-0.00238 (0.00153)
Total New Evidence	-0.0440 (0.0581)
Recantation	0.00859 (0.0811)
False Confession	0.0322 (0.108)
Alt Perp – Confess	0.0566 (0.0927)
Alt Perp – Other	0.0466 (0.138)
DNA	0.0334 (0.0826)
Forensics Other	0.0886 (0.0810)
Witness Misidentification	0.213* (0.124)
New Witness	0.183 (0.116)
Official Misconduct	0.0447 (0.0790)

IAC	0.0730
	(0.0992)
New Alibi Evidence	-0.167*
	(0.0923)
Constant	0.152
	(0.179)
Observations	265
R-squared	0.296
Robust Std Errors	Yes
Location FE	Yes

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 3 shows the results of an exploratory analysis on the potential determinants of prosecutors' responses to a PCM. The dependent variable is a dichotomous indicator for whether the prosecution offered a plea deal (offered a deal = 1) or not (did not offer a deal = 0). The independent variables are the nature of the offense for which the defendant is prosecuted, the years served, the maximum number of years remaining to serve, the maximum years of sentence originally imposed, the nature of the new evidence leading to the PCM, and the total number of new pieces of evidence available. Model 1 is estimated via OLS, and the robustness checks are performed using a logit and probit specification. The full results are available in the Appendix. The three models are estimated with robust standard errors and location fixed-effects to account for time-invariant factors at the districts where the cases are taken by the Innocence Project.

Focusing on the results that are statistically significant, this analysis suggests that prosecutors are more likely to offer a plea deal when defendants are prosecuted for murder, nonviolent offenses (such as burglary, unlawful possession of a firearm, drug possession, and possession with intent to distribute), and other violent offenses, as opposed to attempted homicide and sex offenses against children. To understand better the association between these types of offenses and the response of the prosecution, we estimate a prediction of the prosecution's response to a PCM based on our model. According to these predictions (predictive margins), when the offense is murder, the probability that the prosecution offers a plea deal increases from 8% to 19%, according to the predictive margins in our model. In other words, when the offense is one other than murder, the predicted probability that the prosecution will offer a plea deal prior to adjudication of the PCM is 8% while holding all other covariates

in the model constant at their means. When the offense is murder, the predicted probability that the prosecution offers a plea deal is 20% while holding all other covariates constant at their means.

Similarly, the probability of offering a plea deal in the pre-adjudication phase increases from 13% to 26% when the offense is nonviolent and from 9% to 25% when the offense is an "other violent" offense.[100] The coefficients for these types of offenses are also statistically significant and positively correlated with the dependent variable in the robustness checks available in the Appendix. This suggests that the strength of association between these types of offenses and the prosecution offering a plea deal is plausible and robust to other model specifications.

The results also suggest that prosecutors are less likely to offer a plea deal in the pre-adjudication phase when the offense corresponds to attempted murder. With this type of offense, the probability of offering a plea deal decreases from 16% to 1%, according to the predictive margins in our model. In other words, the predicted probability that the prosecution offers a plea deal is 16% when the offense is other than attempted murder but is 1% when the offense is attempted murder, holding all other covariates at their means. This result, however, is not robust to other model specifications.

Together, these data appear to reflect strategic thinking by prosecutors at the pre-adjudication phase. The increased likelihood of a plea offer in murder cases, for example, might suggest that prosecutors are especially motivated to preserve those most serious convictions and hence are inclined to bargain when those convictions appear vulnerable. This, however, does not explain why the plea-offer rate also goes up for other violent offenses and for nonviolent offenses.

The data also suggest that the type of new evidence matters when it comes to prosecutors offering a plea deal. The data show that a witness misidentification[101] increases the probability of offering a plea deal—from 13% to 34%. Note, however, that the coefficient is not statistically significant at conventional levels.

Lastly, when the new evidence is a new alibi, the probability that the prosecution offers a plea deal decreases from 15% to zero. This finding, however, also is not statistically significant at conventional levels.

These data together offer at least some support for the hypothesis that prosecutors employ plea bargaining strategically to shore up weak cases. Eyewitness error is now widely recognized as prevalent and a leading

100. Here the 13% and 9% baselines correspond to the predicted probabilities that the prosecution will offer a deal when the offense corresponds to other than "nonviolent" and when the offense is other than "other nonviolent," respectively. Note that the coefficient for nonviolent offenses is not statistically significant at conventional levels.

101. The presence of "witness misidentification" in a case was based on innocence organization assessments and responses to our survey instrument; in each such case, the responding organization reported a witness misidentification in the case.

cause of wrongful convictions.[102] When confronted with evidence of eyewitness error, therefore, prosecutors are very likely to realize that their convictions are vulnerable. This might explain the increased likelihood that a prosecutor will perceive a need to make a plea offer to preserve the conviction. Alibis, by contrast, are notoriously ineffective as defenses.[103] Assuming prosecutors recognize this, the low rate of plea offers in innocence cases with new alibi evidence might reflect prosecutors' strategic assessments that the original conviction is relatively secure, and hence there is no need to offer a sweet plea deal to preserve it.

2. POST-NEW-TRIAL PLEA BARGAINING

Our data allow us to replicate the previous analysis using as the dependent variable the prosecution's decision to offer a plea deal in response to the court granting a new trial. The results for this OLS analysis are in Table 3 below, and the full results with robustness checks are available in Table D in the Appendix. Note that the results here are different in various ways from those in Table 2, suggesting that the factors that shape the prosecution's decision to offer a plea deal are different at different stages of the prosecution process. When the courts grant a new trial, according to the results in our model, it is less likely for the prosecution to offer a plea deal as the number of years served increases and when the type of new evidence that emerges corresponds to recantation, DNA, official misconduct, and a new alibi.

Table 3. Exploratory Analysis—Prosecution's Response to a New Trial

VARIABLES	(1) OLS
Attempted Homicide	0.184

102. *See* Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 379 (2016) ("[E]yewitness testimony is the most common evidentiary feature of wrongful convictions among those later exonerated by DNA.").

103. It is not uncommon for juries to reject alibi evidence—even true alibi evidence—particularly when the alibi witnesses are perceived as motivated to protect the defendant. *See* Elizabeth A. Olson & Gary L. Wells, *What Makes a Good Alibi? A Proposed Taxonomy*, 28 LAW & HUM. BEHAV. 157, 157–58 (2004) (noting that, even for individuals later exonerated by DNA testing, alibi evidence is often ineffectual and that indeed "'weak alibis' [are] often exploited by prosecutors and used as incriminating evidence"); R. C. L. Lindsay, Robert Lim, Louis Marando & Deborah Cully, *Mock-Juror Evaluations of Eyewitness Testimony: A Test of Metamemory Hypotheses*, 16 J. APP. SOC. PSYCH. 447 (1986) (finding that only alibi witnesses who were not relatives of the defendant were effective at reducing convictions in cases in which an eyewitness identified the defendant as the perpetrator).

	(0.126)
Child Abuse	0.165 (0.247)
Murder	0.115* (0.0613)
Nonviolent	-0.0273 (0.0623)
Other Homicide	0.0107 (0.126)
Other Violent	0.0803 (0.0499)
Sexual Offense – Adult	-0.00190 (0.0557)
Sexual Offense – Child	0.125 (0.114)
Years Served	-0.00654* (0.00334)
Max Years Remaining	0.00202 (0.00177)
Sentence – Upper Bound	-0.000784 (0.00184)
Total New Evidence	0.133 (0.085)
Recantation	-0.144 (0.0909)
False Confession	-0.0894 (0.129)
Alt Perp – Confess	-0.0920 (0.133)
Alt Perp – Other	-0.0668

	(0.142)
DNA	-0.201**
	(0.0819)
Forensics Other	-0.0570
	(0.0953)
Witness Misidentification	-0.107
	(0.132)
New Witness	-0.174
	(0.140)
Official Misconduct	-0.201**
	(0.0988)
IAC	-0.122
	(0.0949)
New Alibi Evidence	-0.213*
	(0.109)
Constant	0.140
	(0.193)
Observations	196
R-squared	0.431
Robust Std Errors	Yes
Location FE	Yes

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 3 shows the results of an exploratory analysis on the potential determinants of prosecutors' responses to courts granting a new trial. The dependent variable is a dichotomous indicator for whether the prosecution offered a plea deal (offered a deal = 1) or not (did not offer a deal = 0) in response to the courts granting a new trial. The independent variables are the nature of the offense for which the defendant is prosecuted, the years served, the maximum number of years remaining to serve, the maximum years of the sentence originally imposed, the nature of the new evidence leading to the PCM, and the total number of new pieces of evidence available. Model 1 is estimated via OLS with robust standard errors and

location fixed-effects to account for time-invariant factors at the districts where the Innocence Project takes the cases.

According to the predictive margins from the model in Table 3, the probability that the prosecution offers a plea deal after a court grants a new trial decreases 6% for a one-standard deviation increase in the number of years served. When the type of new evidence is DNA, the probability decreases 22%. And when the evidence corresponds to official misconduct, the probability decreases 19%. Lastly, there also is a decrease in the probability that the prosecution will offer a plea deal when the type of new evidence corresponds to a new alibi. In such cases, the probability decreases 14%, although the coefficient for new alibi variable is not statistically significant at conventional levels.

3. Plea-Bargaining Responses to Various Forms of New Evidence Across Stages of the Post-Conviction Process

The data tell us also that there are differences in what prosecutors do with a case in lieu of offering a plea deal, depending on some of these variables. Our data suggest, for example, that when the new type of evidence corresponds to DNA or official misconduct, prosecutors tend to dismiss the case in lieu of offering a plea deal. Figure 10 below illustrates these patterns by showing the percentage of cases for which these types of evidence were registered and the prosecution's response to a PCM and to a new trial. The figure shows that in most of these cases, the prosecution dismissed the case. But there are differences depending on the type of new evidence in the case and the stage of the process, among other things.

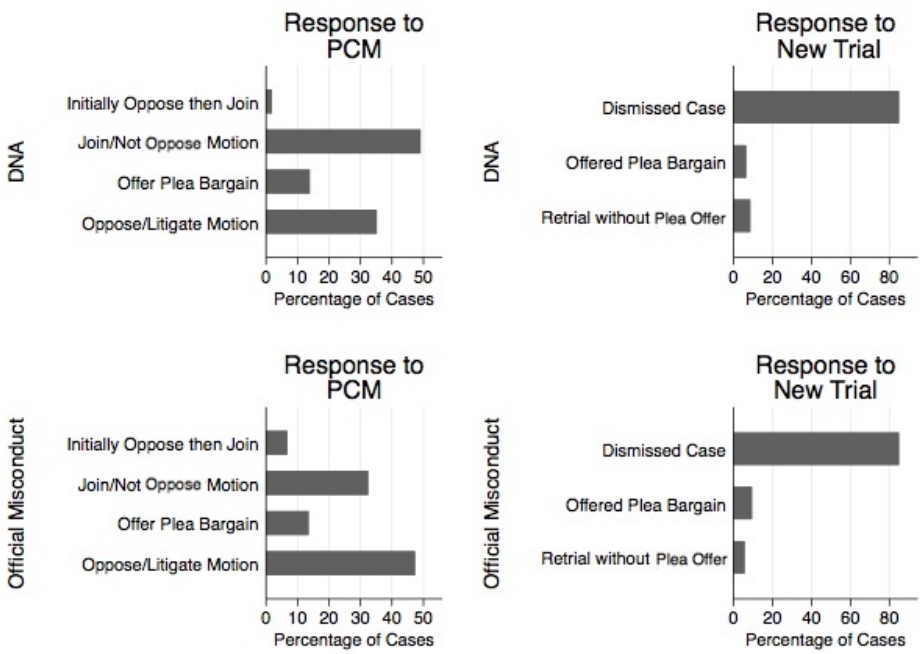

Figure 10. Response of the Prosecution by Stage for Cases with DNA and Official Misconduct as New Types of Evidence

Again, these data are telling. The reduction in the likelihood of a plea offer in official misconduct cases, for example, might reflect an increased defensiveness by prosecutors—an initial unwillingness to accept that they or their colleagues engaged in misconduct. Support for this comes from the fact that, in close to half of the official misconduct cases in which prosecutors did not offer a plea bargain, they opposed any relief from the conviction at the pre-adjudication phase. In response to a post-conviction motion alleging official misconduct, prosecutors opposed the motion in 47% of the cases. But once a court found misconduct and granted a new trial, the prosecution then dismissed the charges in 85% of the cases.

While not achieving statistical significance, the data also suggest a reduction in the likelihood of a plea bargain in recantation cases, and this might reflect another type of strategic thinking. It might be that prosecutors perceive recantation evidence (such as the alibis discussed above) as unpersuasive and thus less threatening. Courts are widely

skeptical of recantation evidence,[104] so prosecutors might view the recantations as a relatively weak threat to the conviction, making a plea offer comparatively unnecessary. If we look at these decisions through the lens of the trial-shadow theory, prosecutors confronted with recantation evidence might be assessing the likelihood of conviction as remaining relatively high, and hence they might see little need to offer significant discounts to the expected trial outcome.

New DNA evidence also might reflect strategic thinking, but be working in the opposite direction. DNA evidence is, of course, uniquely powerful and can serve as the most convincing basis possible for exoneration.[105] When confronted with new DNA evidence, prosecutors themselves may recognize a failed conviction beyond redemption and, therefore, not even worth bargaining over. These might be the cases in which prosecutors, as ministers of justice, see their duty to dismiss the charges as most compelling. Again, our data support this hypothesis: when confronted with new DNA evidence, prosecutors tended to dismiss the cases rather than pursue a retrial. In response to a post-conviction motion in DNA cases, prosecutors joined or did not oppose the motion in 57% of the cases. And in response to a new trial, the prosecution dismissed 91% of the cases.

Just as we are able to explore the elements potentially shaping the prosecution's decision to offer a plea deal at different stages of the process, we also can explore what shapes whether there is ever a plea offer made in the cases we have in our dataset. For this purpose, we created a dichotomous indicator taking the value of 1 when the prosecution offered a plea deal at any point throughout the prosecution process and 0 otherwise. We use this indicator as our dependent variable, and as independent variables we use the same covariates as in our previous models. The results of this analysis via OLS regression are in Table 4 below, and the full results with robustness checks via probit and logit regressions are in Table E in the Appendix. The results in Table 4 echo the results on Table 2 about the prosecution's decision to offer a plea deal at the pre-adjudication phase. The model in Table 4 suggests that the probability of ever offering a plea deal is higher when the offense corresponds to murder, "other violent," and sexual offense against an

104. An oft-repeated proposition in judicial opinions is that recantation evidence is disfavored in the law. *See, e.g.*, *People v. Jenkins*, 923 N.Y.S.2d 706, 711 (N.Y. App. Div. 2011) ("Recantation evidence is considered to be the most unreliable form of evidence . . . ."); *State v. McCallum*, 561 N.W.2d 707, 712 (Wis. 1997) ("Recantations are inherently unreliable."); Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based Upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433, 1434 (1986) ("[R]ecantations are typically viewed with suspicion . . . .").

105. *See generally* THE INNOCENCE PROJECT, https://www.innocenceproject.org [https://perma.cc/WY4M-CU8U] (last visited Mar. 2, 2022) (maintaining database of exonerations based solely on post-conviction DNA testing).

adult. On the other hand, the probability of a plea offer is reduced when the type of new evidence is a new alibi.

Table 4. Exploratory Analysis—Prosecution's Decision to Ever Offer a Plea Deal

VARIABLES	(1) OLS
Attempted Homicide	-0.0411 (0.0908)
Child Abuse	0.116 (0.226)
Murder	0.177** (0.0692)
Nonviolent	0.0564 (0.0804)
Other Homicide	0.190 (0.128)
Other Violent	0.183*** (0.0608)
Sexual Offense – Adult	0.120* (0.0664)
Sexual Offense – Child	0.102 (0.155)
Years Served	-0.00319 (0.00378)
Max Years Remaining	0.00105 (0.00175)
Sentence – Upper Bound	-0.00158 (0.00174)
Total New Evidence	0.0689 (0.0857)

Recantation	-0.149
	(0.104)
False Confession	-0.0503
	(0.130)
Alt Perp – Confess	-0.0416
	(0.114)
Alt Perp – Other	0.0552
	(0.150)
DNA	-0.0840
	(0.0978)
Forensics Other	0.0367
	(0.103)
Witness Misidentification	0.0731
	(0.135)
New Witness	0.0747
	(0.152)
Official Misconduct	-0.114
	(0.103)
IAC	-0.0235
	(0.122)
New Alibi Evidence	-0.234**
	(0.117)
Constant	0.310
	(0.221)
Observations	265
R-squared	0.332
Robust Std Errors	Yes
Location FE	Yes

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 4 shows the results of an exploratory analysis of the potential determinants of prosecutors' offering a plea deal at any stage of the litigation process. The dependent variable is a dichotomous indicator for whether the prosecution offered a plea deal (offered a deal = 1) or not (did not offer a deal = 0) at any stage of the litigation process. The independent variables are the nature of the offense for which the defendant is prosecuted, the years served, the maximum number of years remaining to serve, the maximum years of sentence originally imposed, the nature of the new evidence leading to the PCM, and the total number of new pieces of evidence available. The model is estimated via OLS with robust standard errors and location fixed-effects.

According to the predictive margins in Table 4, the probability of ever offering a plea deal is greater when the type of offense is murder, such that the probability increases from 13% to 31%. Similarly, the probability increases from 17% to 35% and from 21% to 33% for cases in which the offense is an "other violent" offense or sexual offense against an adult. Regarding types of new evidence, echoing the results in Table 2 and Table 3, when the type of new evidence is a new alibi, the probability of ever offering a plea deal decreases from 24% to 0%.

Although counterintuitive, the positive correlation between severe offenses (such as murder) and the prosecution's inclination to offer a plea deal might reflect the greater room to bargain that prosecutors have due to the steeper sentences imposed for these types of offense. The correlation might also reflect the greater urgency that prosecutors feel to protect convictions in the most serious types of cases. More troubling, to the extent that some of the generous plea offers in these cases might represent some type of prosecutorial misconduct—for example, prosecutors manipulating the plea process to preserve illegitimate convictions, even convictions of the innocent—our data are consistent with patterns found by researchers with the National Registry of Exonerations.[106] Examining their data on wrongful convictions since 1989, Samuel Gross and his colleagues found that the rate of prosecutorial misconduct as a contributor to a wrongful conviction was highest in murder cases when compared to all other types of offenses except white collar crimes.[107] Together, these data suggest a pattern in which prosecutors appear most likely to push the

106. *See* SAMUEL R. GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 11–33 (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/R4TC-X3CZ].

107. *Id.* at 12 tbl.3. Gross and his co-authors suggest that this pattern has two explanations: "[O]fficial misconduct is more likely to *occur* in exonerations for more aggravated crimes, especially murder, and misconduct that occurs in such cases is more likely to be *detected*." *Id.* at 15.

envelope of appropriateness when addressing the most serious type of offense, even at the risk of convicting the innocent.

Again, the patterns we identified regarding the types of new evidence and the prosecutors' responses suggest that prosecutors do behave strategically depending on how new information might shift their leverage in the bargaining process. Our analysis suggests that prosecutors seem more reluctant to offer a plea deal when there is a new alibi across all stages of the prosecution process. Yet they are more willing to offer a plea deal when there is a witness misidentification or when a new witness emerges at the pre-adjudication phase of the post-conviction motion.

III. IMPLICATIONS FOR THE LEGITIMACY OF THE PLEA-BARGAINING SYSTEM

The data presented thus support the claim that plea bargaining's innocence problem is real and that it infects the most serious kinds of cases. This in turn raises questions about the plea-bargaining system itself, the motives and behaviors of prosecutors, and the negotiating strategies and postures of defense lawyers.

While plea bargaining has long had its critics, the trial-shadow theory has been invoked to blunt those criticisms by suggesting that plea bargaining does little more than approximate trial outcomes, but in a much less costly way. If trial outcomes are the gold standard, and plea bargaining occurs in the shadow of those outcomes by incorporating the law and expected outcomes to arrive at a bargained-for outcome of approximately equal value, then there is no need to consider serious reforms or the abolishment of plea bargaining. Bibas explains it this way:

> The shadow-of-trial argument . . . means there is no need to abolish plea bargains, which resolve most adjudicated criminal cases. If highly proceduralized and regulated trials serve as a backstop to largely unregulated plea bargaining, we do not need new procedural safeguards for pleas because plea outcomes already incorporate the value of trial safeguards. . . . [I]f we assume that police and prosecutors want to get the most bang for their buck, they have incentives to go after the worst criminals who face the strongest evidence of guilt. Conversely, this incentive should steer police and prosecutors away from those who may well be innocent.[108]

But if, as the data in this Article suggest, prosecutors in a meaningful proportion of cases are manipulating their bargaining power in such dramatic and powerful ways as to induce probably innocent defendants to

108. Bibas, *supra* note 55, at 2466.

plead guilty, this defense of plea bargaining loses force. The vast menu of options available to prosecutors and the threat of massive injustice too easily can be used to produce lesser, but still serious, injustices. Proof of this reality casts doubt on the legitimacy of plea bargaining, at least as currently practiced in serious cases.

More than fifty years ago, the American Bar Association (ABA) cautioned that disproportionately steep plea discounts could be inappropriate. The ABA's Project on Standards for Criminal Justice Relating to Pleas of Guilty observed:

> Assuming that two defendants have engaged in the same conduct under essentially the same circumstances and that the usual presentence information as to the two does not materially differ, is it proper to give a somewhat lower sentence to one defendant because he has consented to enter a plea of guilty? . . . [M]ost judges consider such leniency proper *if the sentence disparity is not unreasonable*.[109]

Yet nearly forty years ago, Albert Alschuler surveyed the empirical data and concluded that, when comparing plea outcomes to trial outcomes, "in a great many cases the sentence differential in America assumes shocking proportions."[110] Our data reinforce that conclusion today.

In this regard, the rationale adopted by the Supreme Court for approving plea bargaining is worth revisiting. Prior to the 1970s, courts generally disapproved of bargained-for justice, repeatedly proclaiming that convictions produced by bargaining were inherently coercive and constitutionally infirm.[111] Moreover, the Supreme Court consistently insisted that "the incentives offered in return for a plea must not be so powerful as to remove the defendant's ability to consider the choice and act with 'free will.'"[112]

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109. AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIM. JUST., STANDARDS RELATING TO PLEAS OF GUILTY 37–38 (1968) (emphasis added).

110. Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 90, at 656; *see, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59, 363 (1978) (upholding the constitutionality of a life sentence following trial even though the defendant had been offered, but declined, a plea deal of five years' imprisonment).

111. For discussions of this history, see Alschuler, *Plea Bargaining and Its History*, *supra* note 23, at 7–40; Dervan, *supra* note 1, at 65–82; Dervan & Edkins, *supra* note 3, at 7–15.

112. Dervan, *supra* note 1, at 93; *see, e.g.*, *Brady v. United States*, 397 U.S. 742, 750 (1970) ("[T]he agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."); *Bordenkircher*, 434 U.S. at 363 ("[A]cceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process."); *see also Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.").

But as plea bargaining continued to grow in practice and the crush of criminal caseloads made bargaining all but unavoidable, the Court finally capitulated and endorsed plea bargaining as an essential feature of the criminal justice system.[113] In 1970, in *Brady v. United States*,[114] the Supreme Court endorsed plea bargaining as a necessary compromise:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.[115]

In so holding, however, the Court cautioned that the constitutionality of the practice might be altered if it became clear that bargaining was producing too much injustice. The Court explicitly addressed the potential innocence problem, stating the following:

> This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. *We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves*.[116]

It is now widely accepted that accuracy is a serious concern in plea bargaining and that a system that pressures too many innocents to condemn themselves would be constitutionally suspect. As Lucian Dervan

113. *See, e.g.*, *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice.").

114. 397 U.S. 742 (1970).

115. *Id.* at 752.

116. *Id.* at 757–58 (emphasis added).

has put it, "The *Brady* Court stated that if the plea bargaining system began to operate in a manner resulting in a significant number of innocent defendants pleading guilty, the Court would reexamine the constitutionality of bargained justice."[117] And Dervan concludes, "[T]here is a significant innocence problem with plea bargaining today. This being the case, the *Brady* safety-valve may not be working and, if so, defendants, both innocent and guilty, are being offered unconstitutional incentives to confess."[118]

The data in this Article support that conclusion. The evidence now shows that the time has come to take corrective measures against an intensely coercive process. While some critics of plea-bargaining have long called for abandoning the practice,[119] full abolition is nowhere on the horizon, both because plea bargaining has become so entrenched in our system and culture[120] and because, like discretion itself, it is nearly impossible to stamp it out. Like a bubble in a balloon, squeeze it in one way or place and it will find a way to pop up somewhere else.

IV. POTENTIAL FIXES

Given problems such as those we have identified here, prominent scholars have long advocated abolishing plea bargaining.[121] Assuming that such proposals have no practical chance of being adopted,[122] we address a different question: Short of abolishing plea bargaining altogether, what steps could system actors take to solve or at least mitigate the innocence problem?

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117. Dervan, *supra* note 1, at 57.

118. *Id.*

119. *See, e.g.*, Schulhofer, *supra* note 56, at 2000–09; Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 935–36 (1983); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 204–05 (1979).

120. In 1971, in *Santobello v. New York*, Chief Justice Burger expressed the prevailing view of plea bargaining in this way: "'[P]lea bargaining[]' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." 404 U.S. 257, 260 (1971); *see also* Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2023 (2006) ("[T]he American criminal justice system, like the civil system, would collapse if even a small percentage of suspects took advantage of these procedures and demanded trials.").

121. *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 23, at 1180; Schulhofer, *supra* note 56, at 2000–09.

122. For a summary of the arguments asserting that abolishing plea bargaining is not realistic, see Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 609–13 (2005).

A. Greater Judicial Involvement in Plea Bargaining

1. GENERALIZED FAIRNESS REVIEW

In most U.S. jurisdictions, judges are barred from participating in the plea-bargaining process; their role is a purely passive one aimed at ensuring, through a brief colloquy at the plea hearing, that the accused is entering the plea knowingly, voluntarily, and intelligently and that there is a sufficient "factual basis" for the plea.[123] While the factual basis inquiry is ostensibly designed to provide some measure of protection against conviction of the innocent, in reality "the factual basis inquiry into the plea is often perfunctory."[124] The inquiry typically involves a brief recitation of the allegations—often just a short summary from the prosecutor or a reading of the indictment, information, or complaint—and an inquiry to the defense as to whether those summarized facts are true or can be used as the factual basis.[125] Even in *Alford* pleas, the standard comes nowhere close to requiring proof beyond a reasonable doubt but rather is "something closer to a 'high probability of conviction'"[126] or even a subjective "I-know-it-when-I-see-it" approach.[127]

Accordingly, scholars have argued for greater judicial oversight of the plea-bargaining process. Blume and Helm argue that "the criminal justice system could (and definitely should) require more judicial

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123. *See* FED. R. CRIM. P. 11(b); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1142 (2011); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1123–34 (1976) (acknowledging the consensus that trial judges should not participate in plea bargaining but arguing that judges should assume a more dominant role).

124. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMPAR. L. 199, 212 (2006). Christopher Slobogin describes it this way:

> While the arraignment judge must find a factual basis for the plea, this requirement can be satisfied merely by asking the parties in charge of evidence production—the prosecutor and the defense attorney—if such a basis exists, and not even that much is required for the facts underlying the sentence.

Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1518 (2016) (footnotes omitted). For a discussion of the varied and generally lax standards courts apply when assessing the factual basis for a plea, see Myeonki Kim, *Conviction Beyond a Reasonable Suspicion? The Need for Strengthening the Factual Basis Requirements in Guilty Pleas*, 3 CONCORDIA L. REV. 102, 120–23 (2018).

125. *Santobello*, 404 U.S. at 261–62; *see also* FED. R. CRIM. P. 11(b)(3).

126. Turner, *supra* note 124, at 213 (quoting John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 126 (1977)).

127. Barkai, *supra* note 126, at 123.

supervision of the plea bargaining process."[128] They suggest, for example, that, "[a]t one end of the spectrum, judges could be authorized to strike the death penalty as a potential punishment if the court thought it was being used only for, or primarily for, 'plea extraction' purposes."[129] Máximo Langer argues, somewhat more expansively, that courts should recognize that plea bargaining becomes coercive if the threatened penalty for going to trial exceeds "a fair sentence that fits the characteristics of the offense and the offender."[130] Similarly, Conrad Brunk suggests that the relevant question is "whether the charge and sentence threatened and imposed" on the defendant who insists on trial are "normal."[131] Justice Powell, in his dissent in *Bordenkircher v. Hayes*, posited a similar inquiry. Powell argued that, when a prosecutor threatens potentially coercive charges for failure to accept a plea offer, "the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent . . . in the first place."[132]

As important as these questions are, however, the reality is that judges are not well positioned to assess them, and more problematically, they appear systematically unwilling to do so. Blume and Helm, for example, concede that judicial inquiry into such matters "is likely to do little good. Even assuming a judge acting in good faith, it is difficult to overcome the information-gap problem. How is a judge to know if the prosecutor is acting coercively or vindictively except in the most egregious cases?"[133] Moreover, judges likely will resist deviating from the entrenched legal culture that demarcates charging and bargaining decisions as off-limits to the judiciary, instead reserving such decisions to the unfettered discretion of prosecutors.[134]

Noted federal judge Jed Rakoff offers an interesting alternative proposal. Judge Rakoff takes his inspiration from the civil system, in which courts have found a way to engage with the parties in settlement negotiations without putting undue pressure on the parties or running the risk of prejudging, or appearing to prejudge, the cases.[135] Rakoff notes that,

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128. Blume & Helm, *supra* note 2, at 183.

129. *Id.*

130. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 239 (2006).

131. Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC'Y REV. 527, 548 (1979).

132. *Bordenkircher v. Hayes*, 434 U.S. 357, 370 (1978) (Powell, J., dissenting).

133. Blume & Helm, *supra* note 2, at 183.

134. *See, e.g.*, *Bordenkircher*, 434 U.S. at 364 ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

135. JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE 32 (2021).

to preserve judicial objectivity, supervision of settlement negotiations in the federal courts is referred to magistrates or special masters, who then withhold the results to the judges who ultimately preside over the cases.[136] He suggests rule changes that would permit a similar process in criminal cases:

> As I envision it, shortly after an indictment is returned (or perhaps even earlier if an arrest has occurred and the defendant is jailed), a magistrate would meet separately with the prosecutor and the defense counsel, in proceedings that would be recorded but placed under seal, and all present would be provided with the particulars regarding the evidence and issues in the case. In certain circumstances, the magistrate might interview witnesses or examine other evidence, again under seal so as not to compromise any party's strategy. The magistrate might even interview the defendant, under an arrangement in which it would not constitute a waiver of the defendant's Fifth Amendment privilege against self-incrimination.
>
> The prosecutor would, in the meantime, be precluded from making any plea-bargain offer (or threat) while the magistrate was studying the case. Once the magistrate was ready, she would then meet separately with both sides and, if appropriate, make a recommendation, such as to dismiss the case (if she thought the proof was weak), to proceed to trial (if she thought there was no reasonable plea bargain available), or to enter into a plea bargain along lines she might suggest. No party would be required to follow the magistrate's suggestions. Their force, if any, would come from the fact that they were being suggested by a neutral third party who, moreover, was a judicial officer that the prosecutors and defense lawyers would have to appear before in many other cases.[137]

Judge Rakoff harbors no illusions that such a procedure would eliminate all false guilty pleas.[138] But such a procedure almost certainly would help. Unfortunately, this additional layer of judicial oversight would require resources—including the availability of magistrates or special masters—that might exist in the federal system but likely would not be possible for most cases in most state systems (where, of course, most criminal cases are handled).

So, while enhanced judicial involvement in the bargaining process might help the system assess critical questions about fairness and

136. *Id.* at 32–33.
137. *Id.*
138. *Id.* at 33.

appropriateness, it is hard to see how most courts can be induced or enabled to address those questions effectively. It may be that prosecutors themselves will have to find ways to address these questions more seriously and consistently. We take up this challenge in the final section of this Article.[139] In the meantime, we turn our attention to other, perhaps more feasible and more narrowly specified, measures that judges realistically can be expected to enforce.

2. ENHANCED FACTUAL BASIS REVIEW

Others have argued that the fairness and accuracy of the plea-bargaining process can be enhanced by demanding more expansive and meaningful "factual basis" review in plea cases.[140] Drawing on examples of judicial involvement in the plea-bargaining process in Germany, Florida, and Connecticut, Jenia Iontcheva Turner argues that "[r]equiring judges to inquire more thoroughly into the facts of the case early, before the parties have agreed on a version of the facts, could minimize the chances that the plea terms are unduly harsh, unduly lenient, or otherwise misrepresent the facts."[141] Turner notes that permitting judges to effectively monitor plea bargains for truth could be accomplished, for example, by providing the complete investigative file to both the judge and defense counsel prior to the plea negotiations, as is done in Germany.[142] Alternatively, Turner and, before her, Albert Alschuler have proposed requiring probation officers to prepare a factually dense presentence investigation report before, rather than after, entry of a plea, which the judge could then use to assess the safety of a conviction.[143] Turner also suggests that statutes "could simply require disclosure to the judge of the same evidence that the parties would receive under liberal discovery rules."[144]

Similarly, Christopher Slobogin argues for what he calls "hybrid inquisitorialism," in which "the judge [would] have the authority to demand evidence supporting any pretrial deal and the authority to dismiss weakly supported or duplicative charges."[145] William Stuntz argues that military courts show how this can be done: "[T]hey review the factual

139. *See infra* Section IV.D.
140. *See, e.g.*, Barkai, *supra* note 126, at 100.
141. Turner, *supra* note 124, at 259–60.
142. *Id.* at 260.
143. *Id.* at 260–61; Alschuler, *supra* note 123, at 1146–47.
144. Turner, *supra* note 124, at 261.
145. Slobogin, *supra* note 124, at 1531.

basis of guilty pleas with great care, and with little deference to the pleas themselves."[146]

Other scholars have suggested that the factual-basis review process can be enhanced to protect the innocent by imposing an explicit standard of proof at the plea hearing. Myeonki Kim argues that no new rules or legislation are required because existing rules can—and *should*—be interpreted to require the judge to find a factual basis by at least a preponderance of the evidence or, preferably, clear and convincing evidence.[147] To facilitate meaningful factual-basis review in a system that requires proof beyond a reasonable doubt, Máximo Langer would require prosecutors to present a sworn affidavit containing a summary of the evidence that would be offered at trial and to "explicitly state her belief that she has enough elements of proof to meet the directed acquittal standard."[148]

At the same time, Kim acknowledges that it is not clear whether imposing a standard of proof "will make much difference."[149] There is, after all, good reason to believe that factfinders, including judges, often fail to apply standards of proof rigorously.[150] Yet, at the least, such a standard would impress on courts the need to make more than a perfunctory review of the evidence in guilty-plea cases. Moreover, Kim argues that imposing such a standard would "induce prosecutors to develop the weaker cases to meet the specific standard of proof," thereby leading them either to strengthen their good cases or to discover exculpatory evidence and to dismiss weak cases.[151]

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146. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 302–03 (2011).

147. Kim, *supra* note 124, at 127.

148. Langer, *supra* note 130, at 276–77.

149. Kim, *supra* note 124, at 128.

150. *See* Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 196–97 (2011) (explaining how cognitive processes such as the "coherence effect" can create confidence inflation that "can boost a mere leaning towards conviction up to a highly confident judgment of guilt that surpasses the requisite threshold for conviction"). Simon also observes that empirical research reveals that "both judges and jurors tend to vote to convict even when they deem the inculpatory evidence to be less than compelling." *Id.* at 202 n.253 (citing Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's* The American Jury, 2 J. EMPIRICAL LEGAL STUD. 171, 186–87 (2005)); *see also* Findley & Scott, *supra* note 48, at 340–41 (discussing the ways in which cognitive biases dilute the proof-beyond-a-reasonable-doubt standard); Michael J. Saks & D. Michael Risinger, *Baserates, the Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 2003 MICH. ST. L. REV. 1051, 1061–62 (discussing how judges' knowledge of guilt "baserates"—that is, their knowledge that the vast majority of criminal defendants are in fact guilty—can affect judicial judgments about evidence).

151. Kim, *supra* note 124, at 129.

Not only would heightened factual-basis review have the potential to screen out some innocent defendants, but the very process of strictly reviewing the factual basis—both at the plea hearing and on appeal—also would likely produce the desirable result of increasing the proportion of cases resolved by trial rather than by plea.[152] Stuntz explains that "[t]he surest road to fewer pleas and more trials is to make trials cheaper and pleas more expensive from the prosecutors' point of view."[153] And the easiest way to do this is to demand that trial judges and appellate courts strictly scrutinize the factual basis for the plea. Stuntz explains, "Stringent appellate review, with reversal in cases of what the military calls improvident pleas, would amount to a procedural tax on pleas. Tax anything and one is likely to see less of it."[154]

This enhanced factual-basis review proposal can be refined further to make it more targeted to the innocence problem and hence more feasible from a resource perspective. Wrongful conviction scholars have explored ideas for separate trial processes, or tracks, reserved for cases involving real claims of actual innocence.[155] The proposals are varied, but at their essence they involve mechanisms by which defendants claiming actual innocence would be entitled to invoke special procedures designed to carefully and thoroughly scrutinize the question of factual guilt and protect them from the kinds of faulty evidence that are known to contribute to wrongful convictions.[156] Often, these proposals specify that, in return for invoking these special innocence procedures, defendants might be required to relinquish some of their other rights, particularly those often thought to interfere with the full search for the truth (such as the right to remain silent).[157] Regardless of the merits of such proposals in general,[158]

152. *See id.*

153. STUNTZ, *supra* note 146, at 302.

154. *Id.* at 303.

155. *See, e.g.*, Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 547 (2008); Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y. L. SCH. L. REV. 1009, 1010–11 (2011–12); D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1282–83 (2004); D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y. L. SCH. L. REV. 869, 869–71 (2011–12). For a summary and analysis of some of these proposals, see Marvin Zalman & Ralph Grunewald, *Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial*, 3 TEX. A&M L. REV. 189, 192–93 (2015).

156. *E.g.*, Bakken, *supra* note 155, at 561–66; Risinger, *supra* note 155, at 1311–13; Risinger & Risinger, *supra* note 155, at 871.

157. *See, e.g.*, Bakken, *supra* note 155, at 549.

158. For a critique of such proposals, particularly a critical assessment of the assertion that eliminating the right to remain silent can enhance the search for the truth, see Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 913, 922–29 (2011–12).

such special screening mechanisms might be readily applicable to the factual-basis review process in guilty plea cases.

Applied specifically to the guilty-plea process, defendants who plead guilty but claim to be innocent could invoke heightened factual-basis review processes by asserting their actual innocence at the plea hearing (or by a prescribed time before the plea hearing). Once the defendant invokes such a process, the judge would be required to undertake a searching inquiry for an adequate factual basis, which would involve an assessment of whether the evidence outlined by the prosecutor would truly be persuasive beyond a reasonable doubt to a jury. To prevent the actual innocence claims from diluting the plea offers prosecutors are willing to make, the prosecutor would not be permitted to withdraw the plea offer after the defendant invokes the heightened factual-basis review process, and the prosecutor would not be permitted to ask the defendant during negotiations if they plan to invoke the process or to condition any plea offers on waiver of the heightened factual-basis review. And if a judge were to find the factual basis wanting, that finding should have preclusive effect, barring further prosecution.

Such a process would simultaneously dissuade prosecutors from making coercively lenient plea offers in weak cases (making it more likely they would just dismiss those cases instead) and permit innocent defendants to take advantage of favorable plea deals without forfeiting their right to be found not guilty by a neutral and impartial magistrate, albeit in a more limited way than would be afforded by a full trial. Moreover, because there is no real dispute about guilt in the vast majority of criminal cases (and hence defendants would have no reason to invoke it in run-of-the-mill cases), this process would reserve the heightened factual-basis review to the limited number of cases in which innocence is really at issue and thereby make the process less resource demanding and hence more feasible.

3. Dismissing Cases with Disproportionately Steep Plea Discounts

Oren Gazal-Ayal proposes instead a partial ban on plea bargaining that prohibits coercively steep plea discounts.[159] Gazal-Ayal notes the objections in the literature to complete bans on plea bargaining—the entrenched nature of the practice and the enormous resource demands of a no-plea-bargaining system.[160] Such considerations, he notes, make a full ban impractical and essentially unthinkable.[161] Moreover, a complete ban runs headlong into the reality that many defenders argue that plea bargains

159. *See* Gazal-Ayal, *supra* note 90, at 2299.

160. *Id.*

161. *Id.* at 2295.

can be beneficial to the accused, whether guilty or innocent.[162] As Scott Howe has put it, "[A]n innocent defendant may prefer the deal, and, certainly, he may prefer the inefficiently lenient one."[163] Stated otherwise, Howe argues, "Abolition of plea bargaining would harm innocent defendants by denying them a risk-reducing option."[164] On the other hand, our data strongly suggest that abolishing plea bargaining might not be much of a disadvantage to innocent defendants, as the defendants in our case cohort who rejected plea bargaining uniformly suffered no harms: in each case, the defendant was ultimately fully exonerated, either by way of dismissal or acquittal.

Gazal-Ayal contends, however, that these arguments about banning plea bargaining largely overlook a key component of the current system of unlimited and largely unreviewed bargaining: the effect that the practice has on prosecutors' screening decisions.[165] When prosecutors know they can extract a plea even in weak cases simply by making overly generous offers, their incentive to screen out those weak cases diminishes.[166] Because plea bargaining removes a primary disincentive that prosecutors might otherwise have to prosecute weak cases, the practice inherently creates risks for the innocent that simply would not exist if prosecutors were forced to be more selective about which cases they prosecute. Banning bargaining in those weak cases, Gazal-Ayal argues, offsets by far any benefits the innocent might receive by being able to bargain down their exposure on crimes they actually did not commit.[167] As he puts it,

> The best way to cope with the innocence problem is to allow plea bargaining only in strong cases and to ban plea bargaining in weak cases. Such a "partial ban" on plea bargains would allow prosecutors to extract guilty pleas when defendants are almost certainly guilty, while forcing them to conduct jury trials when they bring more questionable charges. As a result, the portion of weak cases pursued by prosecutors would decrease substantially.[168]

Gazal-Ayal is skeptical about the ability or willingness of judges to engage in meaningful factual-basis review of the evidence to screen out

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162. For an argument "that many innocent defendants are better off in a world with plea bargaining than one without it," see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119 (2008). Bowers's argument, however, explicitly applies primarily to innocent defendants in low-stakes cases. *Id.* at 1119–20.

163. Howe, *supra* note 122, at 633.

164. *Id.*

165. Gazal-Ayal, *supra* note 90, at 2298.

166. *Id.* at 2298–99.

167. *Id.*

168. *Id.* at 2299.

weak cases.[169] Accordingly, he proposes that courts use overly generous plea concessions as a proxy for weak cases.[170] He argues, "[T]he disparity between the expected sentence after a trial conviction and the bargained-for sentence signals the strength of the case. When the plea bargain leads to an exceptionally lenient sentence, the guilty plea should be rejected."[171]

While judges surely can detect overly generous plea offers at the extremes, it is not clear that they could be effective at detecting or acting on disproportionate plea offers anywhere but at the margins. Regardless, whatever the merits of such a proposal for general pretrial plea-bargaining practice, this proposal has special appeal for plea bargaining in innocence cases in post-conviction litigation.

First, in these cases, it is not difficult to identify what constitutes an extraordinarily lenient plea offer. The original sentence is known, and the differential can be easily calculated, as this Article has done for these cases in the aggregate. No guessing about what the case would be worth after conviction at a trial is needed.

Second, our data confirm that, at least in these cases, when plea bargaining is taken off the table, in most instances prosecutors respond precisely as Gazal-Ayal hypothesizes: they screen out the cases and dismiss the charges. In our cohort of cases, prosecutors at some point in the post-conviction process offered plea deals (almost always remarkably lenient ones) in 14% of the cases, and defendants *rejected* those plea offers 43.6% of the time. When the plea offer was thus rebuffed, prosecutors dismissed the charges in 79.9% of the cases after a new trial was granted; that is, when unable to induce a plea with generous plea offers, the prosecutors did indeed screen out the vast majority of the cases.

Moreover, forcing prosecutors' hands in this way (here, by rejecting the plea offers) did not come at a cost to innocent defendants. After a new trial was granted, seven out of the ten cases that rejected a plea deal were ultimately dismissed. The three remaining cases are pending. Excluding the cases still pending, in no case in which a defendant rejected a plea offer after winning a new trial did the prosecutor retry the defendant.

Justice Michael Donnelly of the Ohio Supreme Court goes even further than Gazal-Ayal for that limited group of cases in which the defendant has filed a motion seeking a new trial. Justice Donnelly calls pleas during post-conviction litigation "dark pleas" and contends that they should be banned entirely.[172] He argues, "Plea agreements are designed to resolve pending accusations of criminal acts made by the government. They should not be used to resolve charges that have already been

169. *See id.* at 2300.

170. *Id.*

171. *Id.*

172. Telephone Interview with the Hon. Michael P. Donnelly, Just., Sup. Ct. of Ohio (June 8, 2021).

resolved."[173] Why? He answers that question with a rhetorical question of his own: "Why would a prosecutor, who after reviewing a prisoner[']s motion for a new trial, who continues to maintain a good faith basis in the guilt of the prisoner *ever* offer a reduced prison sentence before learning the court[']s ruling on a motion for a new trial?"[174] His answer: "They would not unless they believed that the motion had merit and that the new evidence undermined the original theory of guilt and there was a good chance a new trial would be granted if the evidence warranting the new trial was presented at a hearing in open court."[175] Moreover, he contends, plea bargaining in the post-conviction litigation process comes "at a time when the government possesses all the negotiation leverage and the prisoner has virtually none."[176] And he laments that resolving innocence claims through such bargaining "ensures that the evidence supporting the claim of innocence never sees the light of day."[177]

Our data suggest that Justice Donnelly's concern about the possible prosecutorial motivations underlying plea bargaining and the effect that such bargaining has on the search for the truth in innocence cases may have real merit. A ban on plea bargaining during post-conviction litigation may indeed be warranted. And while some might still object that such a ban would harm innocent defendants who do not want to take the risk of a retrial, our data again suggest that that risk is minimal at best.[178] We acknowledge, however, that our data might be somewhat misleading in this respect, because it may be that those defendants in our pool of cases who accepted plea bargains might have accepted the deals precisely because they had weaker defenses than those who rejected the plea offers; thus, some of them indeed might have been convicted at a retrial.

B. Set Discount Rates

Others have advocated for more judicial oversight by authorizing courts to enforce set discount rates in plea bargaining. Albert Alschuler, for example, has argued that in plea bargaining cases, judges should be required to first determine the sentence that would be appropriate if the defendant had been convicted at trial and then apply a "specific discount rate."[179] Stephen Schulhofer has similarly proposed that small set

173. Hon. Michael P. Donnelly, The Dark Plea: A Legal Fiction Produced from Backroom, Off-the-Record Negotiations Which Prevents Truth and Causes Unjust Resolutions (unpublished presentation) (on file with author).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *See supra* notes 117–20 and accompanying text.

179. Alschuler, *supra* note 123, at 1124.

discounts or concessions be applied to plea bargains,[180] and James Vorenberg has argued for set sentencing discounts of ten to twenty percent.[181]

Set discounts, however, can be arbitrary, can fail to take into account relevant factors, and can fail to prevent discretionary practices related to charge bargaining and fact bargaining from overwhelming the prescribed discounts.[182] Indeed, Russell Covey has argued persuasively that set discounts are doomed to fail—and have generally failed when tried—because courts are ill-equipped to police prosecutorial bargaining discounts.[183] He contends,

> Most fixed-discount proposals assume that courts will police plea bargaining by rejecting guilty pleas whenever the terms of the plea are "overly lenient." But this is a job judges are poorly suited to perform. Any system of fixed discounts that depends on preventing prosecutors from making and defendants from accepting overly lenient plea offers is doomed. Prosecutorial discretion over charging decisions, including the important discretion not to charge at all, is far too deeply embedded to be abolished, or even substantially limited.[184]

C. Fixed Trial Ceilings

To overcome this problem, Covey argues that, rather than trying to impose fixed *discounts* for pleading guilty, the focus should be on imposing fixed *ceilings* on *trial* sentences.[185] Under his proposal, instead of capping discounts on plea offers, ceilings would be imposed on the sentences that could be imposed whenever a plea bargain has been rejected and a case goes to trial.[186] These trial ceilings would be based on a set increment that would be permissible above the sentence offered during

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180. Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 792–94 (1980).

181. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560–61 (1981); *see also* Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 782 (1998) ("The establishment of a set of written sentencing discounts . . . limits the concessions the prosecutor can offer for a guilty plea . . . .").

182. Klein, *supra* note 120, at 2040; *see also* Bibas, *supra* note 55, at 2536 (noting that fixed discount rates lead to black-market bargaining).

183. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1241 (2008).

184. *Id.*; *see also id.* at 1260–68 (explaining in detail why fixed discounts have failed).

185. *Id.* at 1242.

186. *Id.*

plea negotiations.[187] For example, Covey explains that a defendant offered a plea bargain to a five-year sentence in a jurisdiction that has adopted a 33% fixed discount could reject the plea knowing that the most the defendant could receive if convicted after a trial would be 7.5 years—"that is, the same five-year sentence he would have received had he accepted the plea offer, adjusted upward to reflect the absence of the fixed discount."[188]

Covey theorizes that these "plea-based ceilings would dramatically curtail prosecutors' ability to induce defendants in weak cases to plead guilty."[189] Because the prosecutor would be bound by their plea offer, it would be difficult for them to make an offer in a weak case so lenient that it would have much likelihood of inducing a defendant to plead guilty.[190] The trial penalty simply would not be sufficiently steep to induce a defendant to accept a plea when the chances of conviction after trial are low.[191] As Covey explains,

> If the prosecutor has a 10% chance of convicting the defendant on a charge that carries a ten-year term, her offer of six months might look good in a world without ceilings, but if the six-month offer creates a nine-month ceiling on the sentence the defendant could receive upon conviction at trial, then the inducement to plead guilty disappears.[192]

But that would not be so in strong cases; if the likelihood of conviction appears to be 80%, that same defendant with an offer of five years and a trial-sentence cap of 7.5 years would find that cap much more appealing and hence a much stronger inducement to accept the plea offer.[193]

Importantly, Covey argues, the ceiling approach is much more enforceable than the set-discount approach because the prosecutor would be bound by their own plea offer.[194] The prosecutor cannot engage in other discretionary practices and bargaining approaches to overcome the cap.[195] If anything, the approach would minimize coercively low plea offers because prosecutors would know that, if the plea bargain were rejected, they would have bound themselves to a relatively low sentence even after trial.

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187. *Id.*
188. *Id.* at 1269–70.
189. *Id.* at 1270.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 1270, 1273.
195. *See id.* at 1273–75.

In the special context of plea bargaining in post-conviction innocence cases—the cases directly studied here—this reform has real potential for minimizing coerced guilty pleas from the innocent. Given the very serious crimes typically at issue in innocence work, low-ball plea offers would be less appealing to prosecutors because they would know that, if rejected, they would essentially be bound to little additional imprisonment even if they undertook the risk, expense, and effort of a new trial. And innocent defendants would be much less likely to feel that overly generous plea offers—such as offers to time served—are too good to turn down, because they would know that, even if they went to trial, they would not be facing onerous prison time. So the relatively minimal risk of reconviction at a retrial (which is what would prompt the low-ball plea offers) might be worth taking.

In this context, however, it is important to note that not all time-served or low-ball prison offers in innocence cases are the same. Some innocence litigants might have served decades by the time of their post-conviction innocence litigation, while others might have served only a few years. Our data show that the number of years served by the time of the PCM ranges from zero to forty-five years. Hence, a time-served offer to someone who has served twenty years could be deemed a plea bargain to an effective sentence of twenty years, so the trial sentence could still be significant (e.g., an additional ten years for a total sentence of thirty years if a jurisdiction were to set a 33% discount rate). To eliminate the coercive nature of plea offers in innocence cases, therefore, the time-served sentences or short additional terms offered in innocence plea negotiations would have to be calculated from their additional time imposed, not from the total time served since original conviction. That is, a time-served offer in the post-conviction context would be deemed a plea offer to a sentence of zero years, regardless of how many years the defendant had already served.

Covey's proposal for trial ceilings would have one other significant consequence worth noting:

> [I]t would change sentencing baselines from trial sentences to plea-bargained sentences. Plea-bargained sentences reflect society's (or at least prosecutors' and judges') estimate of the appropriate punishment in standard cases. Plea-based ceilings formalize this tacit assumption by treating bargain sentences as the legal baseline while preserving the government's ability to seek higher sentences where circumstances warrant.[196]

This shift is entirely appropriate because plea-bargained sentences are in fact the norm, and sentences imposed after trials are the rare exceptions.

196. *Id.* at 1284.

As is widely recognized, upwards of 97% of all criminal convictions are obtained by plea, not trial.[197] Hence, it is a mistake to view plea-bargained sentences as a special deal, a gift,[198] or even the "escape of the guilty."[199] To the contrary, in practice they reflect the collective sense of the criminal justice system of what penalties are routinely appropriate.[200] A system with fixed ceilings on trial sentences recognizes the true norms in our system and thereby might to some extent legitimize plea-bargained "discounts" as no discounts at all—and along the way ease some of the pressure for imposing the onerous sentences that incorporate the trial penalty and that help to drive mass incarceration.

D. Prosecutor Ethics and Office-Based Standards

In the end, no matter what else changes, it is likely that prosecutors themselves will retain substantial power—likely the greatest power of any actors in the system—to set the terms and scope of plea bargains. Regardless of any other changes that might be made—and especially if no other changes are made—ultimately the fixes for plea bargaining's innocence problem require prosecutors themselves to take preventive or corrective measures. Whatever other reforms might be appropriate, prosecutors have not only the power, but also a special responsibility to address this problem. In the American system, prosecutors are explicitly charged with responsibility to act not just as zealous advocates to seek convictions, but also to be "ministers of justice" whose overriding concern

197. RAKOFF, *supra* note 135, at 20.

198. *See, e.g.*, Stanley A. Cohen & Anthony N. Doob, *Public Attitudes to Plea Bargaining*, 32 CRIM. L.Q. 85, 97 (1989–90) (citing data showing that a large majority of Canadians oppose plea bargaining because they believe it treats defendants too leniently).

199. *E.g.*, RALPH ADAM FINE, ESCAPE OF THE GUILTY (1986).

200. For the contrary perspective, which no doubt represents the prevailing view of plea bargaining and trial penalties, see Howe, *supra* note 122. Howe argues that "[d]efendants receiving post-trial sentences get the deserved punishments for their crimes. Bargained sentences involve the extension of leniency on risk-reduction and utilitarian grounds from the maximum deserved punishment." *Id.* at 618. Howe does not, however, explain why the post-trial sentence is the deserved sentence; he just posits it and contends that plea bargains represent discounts. *Id.* at 607. Deserved sentences are, of course, socially constructed values, not immutable features of some natural law. (Howe himself acknowledges this, observing that "[n]otions of desert derive from 'contemporary community morality'" and that it is impossible to "declar[e] a sentence deserved according to any objective measure." *Id.* at 619–20 (footnotes omitted)). But that just makes it all the more difficult to understand why the abnormality of post-trial sentences would be viewed as "deserved sentences" and not some artifact of the process; because well above 95% of all sentences are bargained sentences, not post-trial sentences, *see* RAKOFF, *supra* note 135, at 20, Covey is surely correct that those bargained-for sentences have in fact become our socially constructed expression of appropriate or deserved punishment.

is to ensure fairness and reliability in criminal cases.[201] Making that responsibility even more explicit, since 2008, ABA Model Rule of Professional Conduct 3.8 has imposed on prosecutors a duty to correct wrongful convictions.[202]

Rule-makers can adopt even more explicit ethics standards to address this problem, and prosecutors' offices can adopt standards designed to guide their own bargaining discretion. Both can make clear that, when in doubt, prosecutors should dismiss weak cases rather than attempt to salvage old convictions with disproportionately lenient plea offers.[203] In all cases, prosecutors should ask themselves whether they would have pursued the charges at all "in a criminal justice system without plea bargaining."[204] At a minimum, prosecutors must continually ask themselves the question Justice Powell posed in his dissent in *Bordenkircher v. Hayes*: whether, in the absence of the coercive powers inherent in plea bargaining, "the prosecutor reasonably might have

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201. *See* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2020) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1301–02 (1996); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132 (2004); Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 620–27.

202. *See* James Podgers, *Righting Wrongs*, ABA J. (Apr. 1, 2008, 8:57 PM), https://www.abajournal.com/magazine/article/righting_wrongs [https://perma.cc/LA9Q-F3YE]. Model Rule 3.8 provides, in relevant part:

> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court or authority, and
>
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
>
> (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2020).

203. *See* Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. (SPECIAL ISSUE ON PLEA BARGAINING) 509, 509–10 (1979) ("Abuse of prosecutorial discretion can be lessened considerably if prosecutors promulgate and enforce office standards to guide the plea bargaining decisions of their deputies . . . .").

204. Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 90, at 687–88.

charged respondent . . . in the first place."[205] As Albert Alschuler has pointed out, such a standard, if enforced, would get at the heart of the innocence problem, because "it does not seem too naïve to suppose that a prosecutor in a no-plea-bargaining system would have declined to devote substantial resources to a case in which there was only an outside chance of conviction at trial."[206]

To ensure fidelity to that principle, prosecutors can and should create systems—mandatory checklists,[207] designated devil's advocates,[208] or the like—to ensure that this question gets asked and considered seriously. For example, Blume and Helm suggest various structural reforms to enhance the objectivity of prosecutorial review of innocence claims.[209] One way to do this, they suggest, is for prosecutors to use citizen panels to review cases in which defendants pled guilty but maintain their claim of innocence.[210] This, they contend, would be one way to "extend the historical protection provided by juries to all defendants, not just the 3% who go to trial."[211] As an alternative, they suggest that in those cases in which innocence-claiming defendants win a new trial, a new prosecutor, one not otherwise invested in the conviction, could be assigned to handle the case after the reversal.[212] Yet Blume and Helm express profound skepticism of this proposal, noting that "[p]rosecutors are a 'tight knit group,' and will be reluctant to earn the ire of their current or former prosecutorial colleagues (or law enforcement officers) by dismissing the charges."[213]

Conviction Integrity Units (CIUs) within prosecutors' offices, if designed properly, offer one promising way to break through the groupthink and role biases that can impede the effectiveness of proposals like those of Blume and Helm. A CIU is a division and a set of procedures within a district attorney's office established to identify, investigate, and rectify wrongful convictions within the jurisdiction.[214] Effective CIUs typically have full access to police and prosecutor files and evidence and have management-level authority to review cases; they are staffed with

205. *Bordenkircher v. Hayes*, 434 U.S. 357, 370 (1978) (Powell, J., dissenting).

206. Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 90, at 688.

207. For a discussion of the value of checklists in modifying behavior and improving outcomes in law, medicine, and industry, see Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2226, 2239–42 (2010).

208. For a discussion of the value of devil's advocates for overcoming cognitive biases that can lead prosecutors astray, see Findley & Scott, *supra* note 48, at 388–89.

209. Blume & Helm, *supra* note 2, at 181–90.

210. *Id.* at 186.

211. *Id.* at 189.

212. *Id.* at 186.

213. *Id.* (citation omitted).

214. *See* Scheck, *supra* note 207, at 2248.

attorneys who do not come from the prosecution culture in the jurisdiction (often former defense attorneys or innocence attorneys) and who work closely with public defenders and innocence advocates.[215] Creating, and then entrusting, those units to respond to post-conviction claims of innocence has real potential for mitigating the guilty-plea innocence problem, at least in the post-conviction context.

CONCLUSION

The data we have collected on post-conviction litigation in innocence cases suggest, as long suspected, that plea bargaining is indeed deeply problematic for the innocent. Our data show that, at least in serious cases,[216] the extensive charging options and onerous sentencing options available to prosecutors do enable them to manipulate the bargaining process to make it very difficult even for innocent defendants to refuse to plead guilty (or no contest). And they confirm that in a minority—but a meaningful proportion—of such cases, some prosecutors appear to be so determined to preserve convictions that they offer startlingly lenient plea deals, so lenient they run a serious risk of snaring innocent defendants. Viewing these plea offers through the lens of the trial-shadow theory of plea bargaining, we find that these lenient plea offers also suggest that at least some prosecutors manipulate their plea-bargaining advantages to preserve convictions that even they likely recognize are unwinnable at trial—and that may even involve an innocent defendant. Moreover, the data show that a significant proportion of innocence-claiming defendants do indeed succumb to those plea-bargaining pressures and accept these remarkably lenient plea offers, even though the risks of reconviction may not be high. (Recall that all of the innocence-claiming defendants in our dataset who rejected the plea offers were in the end successful in obtaining relief from their convictions.)

A range of reforms is available to alleviate the harmful consequences of this system. Some reforms include increased judicial involvement in reviewing plea bargains; more robust factual basis review; imposing caps on plea concessions; imposing ceilings on trial penalties after plea bargaining fails; banning plea bargaining in post-conviction litigation; and, in the end, changing prosecutorial ethics, institutional structures, and culture to minimize the risk that prosecutors will seek to secure convictions in cases that are unlikely to be winnable at a retrial (or an initial trial). None of these solutions is likely to solve the problem alone; all are worth considering.

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215. *Id.* at 2249–50; *see also* Boehm, *supra* note 201, at 618.

216. The data we collected are derived almost exclusively from very serious offenses and hence we cannot know how much they apply to minor offenses.

APPENDIX

Table A. Descriptive Statistics

VARIABLES	(1) N	(2) Mean	(3) SD	(4) Min	(5) Max
Years served	271	14.74	10.20	0	45
Type of Offense—Dichotomous Indicator					
Attempted Homicide	272	0.0735	0.261	0	1
Child Abuse	272	0.0257	0.159	0	1
Murder	272	0.599	0.491	0	1
Nonviolent	272	0.151	0.358	0	1
Other Homicide	272	0.0809	0.273	0	1
Other Violent	272	0.342	0.475	0	1
Sexual Offense – Adult	272	0.235	0.425	0	1
Sexual Offense – Child	272	0.0515	0.221	0	1
Type of Offense—Frequencies			*Frequencies*		
Attempted Homicide			20		
Child Abuse			7		
Murder			163		
Nonviolent			41		
Other Homicide			22		
Other Violent			93		
Sexual Offense – Adult			64		
Sexual Offense – Child			14		
Original Sentence			*Frequencies*		
Death Sentence			4		
Indeterminate			1		
NGRI			1		
Sentence Imposed in Years—Upper Bound (Life sentences coded as 39 years of sentence)	266	59.46	34.13	0	300
Max Years Remaining to Serve	266	36.91	32.61	0	299.2
Type of New Evidence—Dichotomous Indicator					
Recantation	272	0.213	0.410	0	1

False confession	272	0.169	0.376	0	1
Alt Perp – Confess	272	0.0588	0.236	0	1
Alt Perp – Other	272	0.0515	0.221	0	1
DNA	272	0.397	0.490	0	1
Forensics Other	272	0.224	0.418	0	1
Witness Misidentification	272	0.0809	0.273	0	1
New Witness	272	0.0662	0.249	0	1
Official Misconduct	272	0.272	0.446	0	1
IAC	272	0.0662	0.249	0	1
New Alibi Evidence	272	0.0331	0.179	0	1
Other	272	0.121	0.327	0	1

Type of New Evidence—Frequencies	*Frequencies*
Recantation	58
False Confession	46
Alt Perp – Confess	16
Alt Perp – Other	14
DNA	108
Forensics Other	61
Witness Misidentification	22
New Witness	18
Official Misconduct	74
IAC	18
New Alibi Evidence	9
Other	33

Total New Evidence	272	1.754	0.890	1	5

Prosecution Response to PCM—Dichotomous Indicator					
Initially oppose then join	272	0.0441	0.206	0	1
Join/Not Oppose	272	0.342	0.475	0	1
Offer Plea Bargain	272	0.143	0.351	0	1
Oppose/Litigate Motion	272	0.471	0.500	0	1

Prosecution Response to PCM—Frequencies	*Frequencies*
Initially oppose then join	12
Join/Not Oppose	93
Offer Plea Bargain	39
Oppose/Litigate Motion	128

Plea Negotiation Outcome Prior to PCM decision			*Frequencies*		
Defendant accepted plea			21		
Defendant rejected plea and prosecution dropped opposition			7		
Defendant rejected plea and prosecution joined vacate request			1		
Defendant rejected plea and prosecution kept opposing new trial			10		
No plea offer			233		
Prosecution Response to New Trial—Dichotomous Indicator					
Case Pending	202	0.0500	0.0703	0	1
Dismiss	202	0.792	0.407	0	1
Offered Plea Bargain	202	0.134	0.341	0	1
Retrial	202	0.0700	0.255	0	1
Prosecution Response to New Trial—Frequencies			*Frequencies*		
Case Pending			1		
Dismiss			160		
Offered Plea Bargain			27		
Retrial			14		
Defendant Response to Prosecution's Plea Offer at Post-PCM stage			*Frequencies*		
Defendant accepted plea offer			16		
Defendant rejected plea offer			11		
Ultimate Outcome—Dichotomous Indicator					
Acquitted	272	0.0147	0.121	0	1
Accepted plea deal before PCM decision	272	0.0735	0.261	0	1
New trial denied	272	0.107	0.309	0	1
Dismissed	272	0.658	0.475	0	1
New trial granted, defendant accepted plea deal	272	0.0590	0.236	0	1
Pardon	272	0.00368	0.0606	0	1

Pending	272	0.0810	0.273	0	1
Resentenced	272	0.00368	0.0606	0	1
Ultimate Outcome—Frequencies			*Frequencies*		
Acquitted			4		
Accepted plea deal before PCM decision			20		
New trial denied			29		
Dismissed			179		
New trial granted, defendant accepted plea deal			16		
Pardon			1		
Pending			22		
Resentenced			1		
Offering a plea deal at any stage—Indicator	272	0.228	0.420	0	1

Information Request Form

Plea Bargaining in Innocence Cases

Please provide the following information for each case your project has litigated within the past ten years, with all identifying information removed (name, jurisdiction, etc.):

1. Crime of conviction (list all offenses) and sentence imposed
2. Years served at the time of filing innocence-based postconviction motion, and expected time remaining on sentence
3. Any plea offers made by the prosecution prior to original conviction, and response of the defendant to those offers
    a. No plea offers made.
    b. Plea offers made but rejected. Terms of the offer(s): _____
    c. Plea offers made and accepted. Terms of the accepted offer: _____
    d. That information is not available to us in our files.
4. General nature of the newly discovered evidence that led to litigating or pursuing a claim of innocence (e.g., DNA, recanting witness, other new scientific evidence, etc.)
5. Response of the prosecution to the motion or other request to vacate the conviction:
    a. Oppose the motion and litigate it.
    b. Offer plea bargain to settle the motion before any decision is made on motion for new trial.
    c. Join in motion to vacate, or at least take the position not opposing the motion.
6. Prosecutor offered plea bargain before court granted (or denied) new trial
    a. No. If no, skip to Question 9.
    b. Yes.
7. Nature of the plea offer made prior to resolution of PC motion
8. Plea negotiation outcome prior to resolution of PC motion
    a. Defendant accepted plea offer; if so, under what terms?
    b. Defendant rejected plea offer and the prosecutor (whether as first response or after initially opposing the motion) dropped opposition to new trial.
    c. Defendant rejected plea offer and the prosecutor (whether as first response or after initially opposing the motion) joined in requesting vacatur of conviction.

9. Outcome of postconviction litigation (include final disposition, after all appeals)

a. New trial granted.
b. New trial denied. If denied, proceed no further with this questionnaire.

10. Number of years served when new trial granted?
11. If new trial granted, what was prosecutor's response?
    a. Dismissed the case without making plea offer or taking case to retrial. If prosecutor dismissed the case, proceed no further with this questionnaire.
    b. Offered plea bargain (whether accepted or not). What terms?
    c. Retrial without any offer of plea bargain. If case went to retrial, skip to Question 13.
12. Defendant's ultimate response to the plea offer?
    a. Accepted it. What terms? If plea bargain accepted, proceed no further with questionnaire.
    b. Rejected it.
13. If defendant rejected plea offer, what was case outcome?
    a. Prosecutor dismissed case prior to (or at) retrial.
    b. Acquittal.
    c. Conviction on same offenses as original conviction.
    d. Conviction on different charges than original conviction (identify them).

Table B. Comparing Innocence Projects in Our Sample and Out of Sample

VARIABLES	(1)	(2)	(3)
Population	-5.26e-09	-2.11e-08	2.65e-08
	(2.25e-08)	(1.33e-07)	(8.22e-08)
Number of Active Volunteers	0.00337	0.0160	0.00855*
	(0.00243)	(0.0118)	(0.00448)
2019 Exonerations	0.00235	0.0521	0.0428
	(0.0228)	(0.141)	(0.0919)
2019 *Alford* Pleas	0.183	0.560	1.265
	(0.186)	(0.738)	(1.011)
2019 Vacated Convictions	0.0929	0.419	-0.109
	(0.132)	(0.672)	(0.322)
2019 Parole Successes	-0.0172	-0.186	-0.149
	(0.0149)	(0.133)	(0.419)
Sentence Reductions	0.536**	2.573*	0.404
	(0.227)	(1.341)	(0.744)
Budget Size	8.00e-09	6.66e-07	1.84e-09
	(1.83e-08)	(6.03e-07)	(3.32e-08)
Constant	0.173*	-1.901***	-0.0534
	(0.0961)	(0.679)	(0.0499)
Observations	52	52	52
R-squared	0.242		0.765
Robust Std Errors	Yes	Yes	Yes
Location FE			Yes

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Note: This table shows the results of an ordinary least squares regression where the dependent variables is a dichotomous indicator for whether an innocence project replied to our information request (response = 1) or not (response = 0). Results from Model 1 show that projects that achieved at least one sentence reduction were more likely to respond to our

information request (p-value = 0.023). This suggests that the results of our empirical analysis will be representative of projects that show a greater rate of success in sentence reductions. Yet, when we reestimate these results via logit regression in Model 2, achieving sentence reductions is no longer statistically significant at conventional levels. Model 2 shows that none of the covariates have an important leverage on determining the response of a project. Model 3 estimates the response of a project along the same covariates via OLS and includes location fixed effects to account for within-location variation. We include this model specification considering that ten out of the 35 locations (28.6 percent of locations) hosting Innocence Project members currently host more than one project. The results from Model 3 suggest that none of the covariates has an important leverage in a project's response to our information request. The Number of Active Volunteers increases its statistical significance slightly, but is not significant at conventional levels. These results suggest that the projects that responded—that is, our in-sample projects—do not differ in important ways from the projects that did not respond across these covariates, which helps address potential concerns about non-response bias. Robust standard errors are reported in parenthesis and the p-values correspond to the statistical significance of the coefficients for each variable. Four projects are dropped from the estimation of the model due to missing values on their covariates.

Table C. Full Results—Prosecution's Response at Pre-Adjudication Phase

VARIABLES	(1) Offered Plea Bargain	(2) Offered Plea Bargain	(3) Offered Plea Bargain
Attempted Homicide	0.184	0.438	0.326
	(0.126)	(1.156)	(0.566)
Child Abuse	0.165	1.422	0.861
	(0.247)	(1.186)	(0.673)
Murder	0.115*	-0.134	-0.0893
	(0.0613)	(0.677)	(0.351)
Nonviolent	-0.0273	-0.715	-0.411
	(0.0623)	(0.980)	(0.451)
Other Homicide	0.0107	0.337	0.254
	(0.126)	(0.963)	(0.509)
Other Violent	0.0803	1.275**	0.719***
	(0.0499)	(0.557)	(0.275)
Sexual Offense – Adult	-0.00190	-1.336*	-0.773**
	(0.0557)	(0.731)	(0.360)
Sexual Offense – Child	0.125	-0.877	-0.536
	(0.114)	(1.109)	(0.604)
Years Served	-0.00654*	0.00134	-0.00244
	(0.00334)	(0.0280)	(0.0146)
Max Years Remaining	0.00202	0.0655**	0.0343**
	(0.00177)	(0.0307)	(0.0148)
Sentence – Upper End	-0.000784	-0.0547*	-0.0280*
	(0.00184)	(0.0305)	(0.0148)
Total New Evidence	0.133	0.780	0.430
	(0.0850)	(0.846)	(0.397)
Recantation	-0.144	-1.301	-0.735*
	(0.0909)	(0.827)	(0.443)

False Confession	-0.0894	-2.375	-1.358*
	(0.129)	(1.565)	(0.732)
Alt Perp – Confess	-0.0920	-0.774	-0.538
	(0.133)	(1.203)	(0.634)
Alt Perp – Other	-0.0668	-0.591	-0.304
	(0.142)	(1.007)	(0.543)
DNA	-0.201**	-1.571*	-0.827*
	(0.0819)	(0.827)	(0.430)
Forensics Other	-0.0570	-0.261	-0.136
	(0.0953)	(0.779)	(0.424)
Witness Misidentification	-0.107	-0.587	-0.340
	(0.132)	(1.254)	(0.680)
New Witness	-0.174	-1.140	-0.589
	(0.140)	(1.225)	(0.622)
Official Misconduct	-0.201**	-1.381	-0.710
	(0.0988)	(1.088)	(0.516)
IAC	-0.122	-1.527	-0.840
	(0.0949)	(1.176)	(0.623)
New Alibi Evidence	-0.213*	—	—
	(0.109)		
Constant	0.140	-1.748	-1.018*
	(0.193)	(1.113)	(0.521)
Observations	196	191	191
R-squared	0.431		
Robust Std Errors	Yes	Yes	Yes
Location FE	Yes	No	No

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Note: This table shows the results of an exploratory analysis on the potential determinants of prosecutors' response to a PCM. The three models have the same dependent and independent variables. The dependent variable is a dichotomous indicator for whether the prosecution offered a plea deal (offered a deal = 1) or not (did not offer a deal = 0).

The independent variables are the nature of the offense for which the defendant is prosecuted, the years served, the maximum number of years remaining to serve, the maximum years of sentenced originally imposed, the nature of the new evidence leading to the PCM, and the total number of new pieces of evidence available. Model 1 is estimated via OLS, Model 2 is estimated via logit regression, and Model 3 via probit regression. The three models are estimated with robust standard errors and location fixed-effects to account for time-invariant factors at the districts where the cases are taken by the Innocence Project. Note that some variables were automatically dropped from the models due to collinearity.

Table D. Full Results—Prosecution's Response to a New Trial

VARIABLES	(1) OLS	(2) Logit	(3) Probit
Attempted Homicide	0.186	0.807	0.437
	(0.126)	(1.228)	(0.592)
Child Abuse	0.135	0.992	0.602
	(0.247)	(1.157)	(0.669)
Murder	0.0986	-0.316	-0.216
	(0.0607)	(0.743)	(0.373)
Nonviolent	-0.0208	-0.766	-0.453
	(0.0621)	(1.033)	(0.496)
Other Homicide	0.00895	0.162	0.141
	(0.124)	(1.005)	(0.522)
Other Violent	0.0441	0.944	0.500*
	(0.0473)	(0.580)	(0.283)
Sexual Offense – Adult	0.0150	-1.164	-0.683*
	(0.0557)	(0.773)	(0.379)
Sexual Offense – Child	0.0980	-0.846	-0.519
	(0.113)	(1.178)	(0.628)
Years Served	-0.00683**	-0.00909	-0.00848
	(0.00333)	(0.0280)	(0.0148)
Max Years Remaining	0.00201	0.0579*	0.0289*
	(0.00177)	(0.0322)	(0.0153)
Sentence – Upper End	-0.000668	-0.0463	-0.0218
	(0.00185)	(0.0323)	(0.0153)
Total New Evidence	0.143*	0.752	0.449
	(0.0861)	(1.030)	(0.431)
Recantation	-0.193**	-2.187**	-1.278***
	(0.0909)	(0.961)	(0.487)
False Confession	-0.102	-2.340	-1.400*

	(0.131)	(1.553)	(0.732)
Alt Perp – Confess	-0.108	-1.148	-0.708
	(0.134)	(1.315)	(0.678)
Alt Perp – Other	-0.0630	-0.572	-0.318
	(0.142)	(1.052)	(0.556)
DNA	-0.217**	-2.274**	-1.245***
	(0.0835)	(0.907)	(0.444)
Forensics Other	-0.0490	-0.384	-0.218
	(0.0961)	(0.890)	(0.451)
Witness Misidentification	-0.112	-0.879	-0.520
	(0.132)	(1.362)	(0.731)
New Witness	-0.173	-1.131	-0.634
	(0.141)	(1.335)	(0.646)
Official Misconduct	-0.227**	-2.084	-1.123**
	(0.0993)	(1.329)	(0.572)
IAC	-0.151	-1.691	-0.929
	(0.0959)	(1.288)	(0.643)
New Alibi Evidence	-0.193*	—	—
	(0.112)		
Constant	0.175	-0.980	-0.582
	(0.189)	(1.262)	(0.555)
Observations	194	189	189
R-squared	0.441		
Robust Std Errors	Yes	Yes	Yes
Location FE	Yes	No	No

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Note: This table shows the results of an exploratory analysis on the potential determinants of prosecutors' offering a plea deal at any stage of the litigation process. The three models have the same dependent and independent variables. The dependent variable is a dichotomous indicator for whether the prosecution offered a plea deal (offered a deal = 1) or not (did not offer a deal = 0) at any stage of the litigation process. The

independent variables are the nature of the offense for which the defendant is prosecuted, the years served, the maximum number of years remaining to serve, the maximum years of sentenced originally imposed, the nature of the new evidence leading to the PCM, and the total number of new pieces of evidence available. Model 1 is estimated via OLS, Model 2 is estimated via logit regression, and Model 3 via probit regression. The three models are estimated with robust standard errors. Model 1 includes location fixed-effects to account for time-invariant factors at the districts where the cases are taken by the Innocence Project. The location fixed-effects were not included in the logit and probit specifications to address non-convergence. Note that some variables were automatically dropped from the robustness checks due to collinearity.

Table E. Exploratory Analysis— Prosecution's Decision to Ever Offer a Plea Deal

VARIABLES	(1) OLS	(2) Logit	(3) Probit
Attempted Homicide	-0.0411	-0.159	-0.179
	(0.0908)	(0.817)	(0.433)
Child Abuse	0.116	0.700	0.383
	(0.226)	(1.027)	(0.623)
Murder	0.177**	1.504***	0.869***
	(0.0692)	(0.544)	(0.288)
Nonviolent	0.0564	0.316	0.171
	(0.0804)	(0.700)	(0.362)
Other Homicide	0.190	1.487*	0.829*
	(0.128)	(0.787)	(0.443)
Other Violent	0.183***	1.510***	0.857***
	(0.0608)	(0.436)	(0.226)
Sexual Offense – Adult	0.120*	1.169**	0.605**
	(0.0664)	(0.563)	(0.288)
Sexual Offense – Child	0.102	1.075	0.693
	(0.155)	(1.495)	(0.698)
Years Served	-0.00319	-0.0228	-0.0134
	(0.00378)	(0.0276)	(0.0140)
Max Years Remaining	0.00105	0.0141	0.00821
	(0.00175)	(0.0208)	(0.0107)
Sentence – Upper End	-0.00158	-0.0168	-0.00943
	(0.00174)	(0.0208)	(0.0109)
Total New Evidence	0.0689	0.573	0.252
	(0.0857)	(0.551)	(0.307)
Recantation	-0.149	-1.194	-0.544
	(0.104)	(0.794)	(0.411)
False Confession	-0.0503	-0.250	-0.212

	(0.130)	(1.076)	(0.542)
Alt Perp – Confess	-0.0416	-0.116	-0.0879
	(0.114)	(0.898)	(0.494)
Alt Perp – Other	0.0552	0.291	0.201
	(0.150)	(1.017)	(0.520)
DNA	-0.0840	-0.708	-0.398
	(0.0978)	(0.664)	(0.366)
Forensics Other	0.0367	0.372	0.248
	(0.103)	(0.649)	(0.357)
Witness Misidentification	0.0731	0.950	0.518
	(0.135)	(0.893)	(0.495)
New Witness	0.0747	0.399	0.334
	(0.152)	(1.173)	(0.577)
Official Misconduct	-0.114	-0.756	-0.445
	(0.103)	(0.737)	(0.399)
IAC	-0.0235	-0.175	-0.0568
	(0.122)	(0.897)	(0.496)
New Alibi Evidence	-0.234**	—	—
	(0.117)		
Constant	0.310	-1.912	-1.005
	(0.221)	(1.259)	(0.703)
Observations	265	247	247
R-squared	0.332		
Robust Std Errors	Yes	Yes	Yes
Location FE	Yes	Yes	Yes

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Note: This table shows the results of an exploratory analysis on the potential determinants of prosecutors' offering a plea deal at any stage of the litigation process. The dependent variable is a dichotomous indicator for whether the prosecution offered a plea deal (offered a deal = 1) or not (did not offer a deal = 0) at any stage of the litigation process. The independent variables are the nature of the offense for which the defendant

is prosecuted, the years served, the maximum number of years remaining to serve, the maximum years of sentenced originally imposed, the nature of the new evidence leading to the PCM, and the total number of new pieces of evidence available. Model 1 is estimated via OLS, Model 2 is estimated via logit regression, and Model 3 via probit regression. The three models are estimated with robust standard errors and location fixed-effects to account for time-invariant factors at the districts where the cases are taken by the Innocence Project. Note that some variables were automatically dropped from the robustness checks due to collinearity.